
1738.

LABATT'S

DISTRICT COURT REPORTS.

STATE OF CALIFORNIA.

COOK vs. HATHAWAY.

Twelfth District Court, for San Francisco Co., Nov. T., 1857.

ACCEPTANCE—COMPLAINT.

Where a party accepts an order for goods, drawn by one who may not have had any goods in his hands at the time, he cannot afterwards, in an action by the person in whose favor the order is made to recover the goods, be permitted to dispute the drawer's title to the same.

Whether in an action on such an order, in which the same is set out in the complaint, the omission to write across its face the acceptance, and in lieu thereof alleging that it was duly accepted &c., is such error as would exclude its introduction on the trial, *quære*.

On motion for a new trial.

This action was commenced on the 22d of August 1856, against *Hathaway* and *Raynor*, partners, to recover the sum of $2,603. 30. Plaintiffs allege in their complaint substantially as follows: that on the 14th of November 1855, one *E. L. Beard* as agent of his wife, made and delivered to plaintiffs the following order on the defendants

which was on the same day accepted by them by writing across the face their firm name.

San Francisco, Nov. 14th, 1855.

C. W. Hathaway & Co.

You will please deliver to *C. W. Cook* or order all the grain you hold for my account subject to your advances, commissions and charges.

Respectfully yours,

E. L. BEARD, for

MRS. E. L. BEARD.

In setting forth this instrument in their complaint, plaintiffs did not write defendants' name across the face but made the above averment.

That defendants then had grain belonging to said *Mrs. Beard* which they sold for $11,745.93; that their advances, commissions &c., amounted to $9,142.63, leaving due plaintiffs $2,603.30, as per statement of sale &c., by defendants made and delivered to plaintiff on January 1st, 1856.

Defendants set up in their answer as a defense that, in an action brought in the superior court of the city of San Francisco by one *Hopkins* against said *E. L. Beard*, the grain and moneys in their hands were attached, and that said *Hopkins* recovered a judgment in said action for upwards of $150,000 and that defendants then paid to him the amount for which he had been therein garnisheed; and afterwards on the 18th day of August, 1856, pursuant to an order of said court defendants paid over to *Hopkins* the amount sought to be recovered by plaintiffs. That the grain in question was, before the said garnishment, the property of *E. L. Beard*, and not of *Mrs. Beard*. That the order set out in the complaint was ante-dated and was not accepted until long after the said garnishment, and was accepted upon the express condition that if defendants should be compelled to pay over the money in the case of *Hopkins* v. *Beard*, the order should be void. That at the time of the acceptance, plaintiff executed an agreement which was part and parcel of the acceptance, and which is to the effect that he should allow the money to remain in defendants' hands until the termination of the said action should "prove and hold them without liability to any other claims or parties for the said amount of surplus money whatever it may be—they to allow me (*C. W. Cook*) from this date interest at the rate of ten per cent. per annum for this amount." That there was no consideration for the acceptance of the order in favor of *Cook;* that

the property belonged to *Beard*, and that defendants believe that the order was drawn in the name of *Mrs. Beard* for the purpose of keeping the property out of the hands of *Beard's* creditors and of deceiving defendants.

On the trial plaintiff introduced the order and proof that it had been presented for payment and refused; also, the written account of sales mentioned in the complaint, and then rested. Defendants moved for a non-suit on the grounds:

First,—That plaintiff had not made out a cause of action against the defendants.

Second.—That the account of *Hathaway & Co.* is with *Cook* and does not show that it relates to the order in question nor that *Mrs. Beard* had any grain there.

Third.—The order is drawn by *Mrs. Beard* by her agent; she being a married woman cannot be a principal.

Motion denied.

The agreement referred to in the answer was given in evidence, and defendants rested.

Defendants asked the court to charge the jury that if there was no evidence that the defendants compose the firm of *Hathaway & Co.*, they must find for the defendants; that the fact was not admitted in the pleadings. Which was refused and in lieu thereof the court charged that the execution of the instrument set forth in the plaintiff's complaint was admitted by the defendants' answer, and that it was therefore not necessary for the plaintiff to prove that the defendants were co-partners, or that they composed the firm of *Hathaway & Co.* in order to entitle him to recover.

Defendants further requested, "That the pleadings do not admit that *Hathaway & Co.* had grain on hand belonging to *Mrs. Beard*, and unless the fact had been proved by other evidence than the order or account rendered plaintiff, he cannot recover." Refused, and in lieu thereof the court charged that the account rendered and order were evidence that they had such grain in their hands.

The defendants, after introducing a judgment roll of the superior court in the case of *Hopkins* v. *Beard*, offered to show by the return of the sheriff to the attachment issued, that the property mentioned in said order and all the proceeds in the hands of *Hathaway & Co.* were

attached; that at the date of the drawing of the order the property belonged to *Beard*, and that there was nothing owing from either *Mr.* or *Mrs. Beard* to plaintiff, and that it was therefore without consideration. Ruled out.

They also offered in evidence the execution issued on said judgment, affidavit of *Hopkins* and orders made supplementary to the issuing of execution, copies of which orders are set forth in the defendants' answer in this action, and also offered to prove by parol evidence that upon the hearing before the judge in such proceedings the plaintiff appeared by his counsel, *Mr. Lockwood*, and presented the order in question and claimed to be entitled to the property and effects in the hands of the defendants, and that the plaintiff's demand was considered by the judge in such proceedings. Ruled out.

The court further charged that the said written instrument executed by the plaintiff to the defendants was void and constituted no defense to the action.

The jury found for plaintiff the whole amount claimed.

Lockwood & Wallace, and *C. H. S. Williams* for plaintiff.

Cook and *Mastick* for defendant.

On the motion for a new trial, *Mastick*, counsel for defendant contended:

First.—The order, as appears from the evidence, was drawn by a married woman and is void. It is settled that a married woman cannot become a party to a will or note or make a valid contract. Contracts made by married women are not like those of infants, voidable, but are absolutely void. *Nightingale* v. *Whittington*, 15 *Mass.* 272, *Howe* v. *Wides*, 34 *Maine*, (4 *Red.*) 566; *Story on Promissory Notes*, § 85; *Story on Bills* §§ 90, 127, 128; *Chitty on Bills*, 20, 24, 28, 32; *Philips* v. *Northup* 12 *How. Pr. R.* 17; *Selover* v. *Amer. Russian Com'l Co.*, 7 *Cal.*, January Term.

Second.—The instrument in question is not a bill of exchange or check, it is not for the payment of money, and it was necessary to aver and prove a consideration for such acceptance, and no proof was given. *Atkinson* v. *Marks*, 1 *Cowen* 691; *Chitty on Bills* 131, 132, 135, 153.

Third.—If the defendants' signature to the word "accepted" amounts to a valid agreement, it only amounts to an agreement or promise to pay according to the tenor of the instrument, that is to say to deliver the grain belonging to *Mrs. Beard*, and plaintiff could only recover upon proof that *Mrs. Beard* had grain *at the time* in defendants' hands. *Atkinson* v. *Marks*, 1 *Cowen* 69, 707.

Fourth.—There is no consideration expressed, and the account rendered in January thereafter did not show that they had at that time any grain or property in their hands and a request from a person not having any interest would not be a good consideration.

Fifth.—If the grain belonged to *Mrs. Beard* it was liable to be seized and attached for the debt of the husband unless an inventory was made and recorded. *Laws of* 1850, p. 204, §§ 3, 4, 5, 6.

Sixth.—The instrument in question not being negotiable, the plaintiff took it subject to all equities, and he occupies no better position than *Mrs. Beard* and holds subject to any claim or defense that could have been set up in an action brought by her. *Chamberlain* v. *Day*, 3 *Cowen* 353, *Taylor* v. *Bowlis*, 9 *ib* 376, *Willis* v. *Twambley*, 13 *Mass.* 204, 305.

Seventh.—The answer did not admit the genuineness of the signature to the account of sales inasmuch as the action was not founded on that. *Practice Act*, § 53.

The signature of an endorser or acceptor need not be denied under oath. *Youngs* v. *Bell*, 4 *Cal.* 201.

Eighth.—If the plaintiff could not recover on the acceptance alone, and the property had been attached in the defendants' hands previous to the agreement made by *Cook* (as defendants offered to prove,) then there was a good consideration for *Cook's* agreement.

C. H. S. Williams, *contra.*—At common law married women can draw a bill, and if accepted the acceptor is bound to the payee and subsequent parties. *Story on Promissory Notes*, §§ 37, 91; *Miller* v. *Delamater*, 12 *Wend.* 433.

The common law rules are not applicable in the premises. For the construction of Art. 11, § 14, of the Constitution of this state, see *Edrington* v. *Mayfield*, 5 *Texas* 363. Defendants having admitted the property to be *Mrs. Beard's* cannot now deny it. *Adams* v. *Gorham*,

6 *Cal.* 68. Section 53 of the Practice Act being remedial must be liberally construed. *Kent* v. *Laffan*, 2 *Cal.*, 595. *Youngs* v. *Bell* (cited *supra*) is not applicable, being a case where the acceptor or endorser is not a party.

From the provision in the law of 1850 with respect to a wife's filing an inventory of the property it cannot be inferred that if she does not file an inventory her property will be liable to seizure for her husband's debts; in all cases the broadest construction which it can receive is that the property may be so liable when left in the husband's possession, not when in the possession of a third party, and particularly when it never was in her possession. A statute must not receive such a construction if it will admit of any other, as to render it open to the objection that it is unconstitutional. *Thorne* v. *City of San Francisco*, 4 *Cal.* 127.

There cannot be in this action a "complete determination of the rights of the parties," and the plaintiff could not join *Hopkins* as a defendant with *Hathaway & Co.;* as against the latter his remedy was simple and plain. *Church* v. *Knox*, 2 *Conn.* 514; *Woodbridge* v. *Winthrop*, 1 *Root* 557; *Ford* v. *Woodward*, 2 *Smead. & Mar.* 2 *Co.*

The doctrine that *Cook* took subject to all equities does not apply. He did not take the assignment of an instrument but bought the goods, and received no better title than *Mrs. Beard* had, and in a litigation between him and *Hopkins* the questions affecting this might be raised, but they cannot be called in question as between *Hathaway & Co.* and plaintiff.

Mastick, for defendant, in reply.

It is assumed that *Mrs. Beard sold* the property to plaintiff. Except the order there is no proof that she claimed the property or that she ever sold it, and from aught that therein appears, *Cook* may be only bailee.

Defendants did not sell the property on account of plaintiff. The complaint is not founded on an account rendered but on the order simply. If the answer admits the signatures it only admits that to the order, not to the account. The quotation from *Story* does not in the original contain the words "by endorsement." The cases cited by him show that the wife's acts have been regarded as the acts of the husband

and that she could not even make an endorsement. In an endorsement there is a valid contract in existence, while in the case of maker there is a failure to create. The common law rule does prevail in the absence of any statute changing it.

There is no evidence that *Mrs. Beard* or her husband declared any property to be hers or that defendant admitted it. The property could only be sold by an instrument in writing signed by her and her husband and acknowledged by her. (*Laws of* 1850, 254, § 6. *Selover* v. *Am. Rus. Commercial Co.*, 7 *Cal.* January Term.)

Defendants are not *estopped* by any action which they have taken, from denying *Mrs. Beard's* title to the property. An *estoppel* is an admission intended to influence the conduct of the person prejudicially to his interest and the party must have acted upon it and must have been prejudiced by it. *Dezell* v. *Odell*, 3 *Hill* 215; *Reynolds* v. *Loundsbury*, 6 *Hill* 535. *Adams* v. *Gorham*, 6 Cal. 68, not applicable.

The acceptance is no acknowledgment; if binding at all, it amounts to an agreement to deliver what quantity of grain defendants held on account of *Mrs. Beard*, and under no circumstances can plaintiff make out a case even of *estoppel* without showing that he parted with some thing of value, and the knowledge that *Mrs. Beard then* had grain and the quality, and as before observed there was an entire omission on his part to show either of those things. Defendants should be allowed to set up the attachment and judgment in *Hopkins* v. *Beard*. When the attachment was issued and levy made, the plaintiff acquired a lien on the property attached. The statute declares that persons garnisheed shall be liable to the *plaintiff* for the amount of defendant's interest in their hands until the attachment is discharged or judgment paid. (*Practice Act*, § 127.) There being no consideration proved for the acceptance, and the paper not being negotiable, plaintiff cannot recover.

NORTON,–J. On the trial of this action, I held that defendants, having accepted the order drawn by *Mrs. Beard* in favor of the plaintiff, for the grain which by the order she claimed to have in their hands, and having rendered an account admitting the sales to have been made on the plaintiff's account, and a balance to be due to him, could not be allowed to resist the payment on the ground that they had no grain of

Mrs. Beard's in their hands at the time of accepting the order, and accordingly all proofs offered by the defendants tending to prove this fact were ruled out as immaterial. The propriety of this ruling seems to be sanctioned by the cases of *Adams* v. *Gorham*, 6 *Cal.* 68, and *Garwood* v. *Simpson*, 7 *Cal.* July Term.

The paper given by *Cook* to the defendants is void as a contract, for want of consideration. It contains no promise on the part of the defendants and is not signed by them. If they had signed it and thereby agreed to pay the ten per cent. interest, I think it would have been a sufficient consideration, because no demand having been made on them for the proceeds of the sales, they were not as yet liable to pay interest. I should in that case have given a liberal interpretation to its inartificial language in order to give it effect, because it appears to contain the real agreement between the parties as it probably existed at the date of the order and acceptance.

There was no error in refusing to charge as requested in regard to proof of the co-partnership of the defendants. The mere fact of their being partners or not was immaterial. If it had been necessary to prove that these two defendants, *Hathaway* and *Raynor*, were the acceptors of the order, it would have been necessary to prove that they were partners doing business under the name of "*Hathaway & Co.*," because that was the only signature to the acceptance. But the order with the acceptance endorsed and the account of sales had been given in evidence without objection, and without requiring proof that they were executed as alleged in the complaint by the defendants under the firm name of *Hathaway & Co.* I do not remember to have added to this refusal, the charge that the execution of the instrument was admitted by the answer, and such a charge is not very naturally connected with the request. But it contains no error. A copy of the instrument having been set out, and the defendants charged with having executed it by the name of *Hathaway & Co.*, it was incumbent on them to deny such execution on oath, or it was admitted. By looking at the complaint, I see that, in truth, the order as accepted is not fully set out; that is, the acceptance is not copied, but instead of this, there is an averment of the acceptance. This circumstance appears to have been overlooked, as no objection is pointed to it, and it is correctly copied in the statement for a new trial, as being the one set forth

in the complaint. If this objection had been taken when the acceptance was offered in evidence, it might have been held to be well taken. It is suggested in the defendants' brief, that the bill of sale was not proved, and is not admitted by the answer because it is not an instrument on which the action is brought. This having been suffered to be given in evidence, without proof and without objection, it is not a ground for a new trial, if the objection would have been a good one if raised at the time. New trial denied.

CARLETON, ASSIGNEE, vs. GLADWIN.

Fourth District Court for San Francisco Co., Oct. T., 1857.

ASSIGNEE—JUDGMENTS—INJUNCTION.

One district court (the 4th) will not entertain jurisdiction of an action in equity brought by the assignee of an insolvent debtor to restrain proceedings at law or set aside judgments in another district court (the 12th), where the proceedings and judgments attacked as well as the insolvent proceedings are all in the last named court. The action in such case should have been instituted in the 12th district court.

Such an action can not be transferred from this court to the other.

Action brought by the assignee of an insolvent firm praying for an injunction against the sheriff of the city and county of San Francisco and certain attaching creditors of the insolvents restraining the former from paying over to the latter, and them from receiving certain moneys in the hands of the said sheriff arising from the sale of property of the defendants by him seized and sold under attachments and executions issued in certain actions brought against the said insolvents by said creditors defendant, and that the money may be decreed to be paid over to the plaintiff as such assignee. The complaint alleges the due appointment of plaintiff by order of the Twelfth District Court, in which the insolvency proceedings were commenced, to the trust; that the claims of the said judgment creditors are pretended and fraudulent, created for the purpose of hindering, delaying and defrauding the other creditors of the insolvents,—that these have assigned to plaintiff all their property, that it does not amount to more than $2,000, that their *bona fide* indebtedness amounts to $123,000, that *Scannell*, the

sheriff is insolvent and that the money cannot be recovered by suing upon his official bond,—that the money is the proceeds of the sale of all the visible property of the insolvents; that it is not more than enough to satisfy said fraudulent claims, and that *bona fide* creditors attached the same property; wherefore he prays for the injunction &c.

One of the creditors defendant, *J. McKenty*, demurs on the ground that the court has not jurisdiction in the premises.

Cook & Fenner, for plaintiff.

Sidney V. Smith, for defendant, J. McKenty.

The other defendants not in court.

HAGER, J.—On rule to show cause why an injunction should not issue. The plaintiff is the assignee in the proceedings in insolvency of defendants *Gladwin & Hugg*, pending in the district court of the Twelfth Judicial District. The other defendants (excepting *Scannell* the late sheriff,) have obtained judgments in the same court against defendants *Gladwin, Hugg & Co.*, and *Scannell* as sheriff has seized under attachments and executions in behalf of the judgment creditors and has in his possession certain moneys of the defendants, *Gladwin, Hugg & Co.* This action is instituted to restrain the sheriff from paying the money in his hands to the judgment creditors, and to compel its payment to the assignee in insolvency for the purpose of having it distributed under the insolvent law: plaintiff alleging that the attachments, judgments &c., are fraudulent and void, and praying it may be so decreed.

It appears that the insolvent proceedings and the judgments are all in the district court of the Twelfth Judicial District. The assignee is the officer of that court, and in my opinion that is the proper tribunal for the hearing and the trial of this action. Under the decisions of the supreme court I have serious doubts whether this court can entertain jurisdiction after the facts referred to have been made to appear.

It is true this action is in equity, whilst that in the Twelfth District Court is one at law, and under the practice as settled by the supreme court, there is a recognized distinction between actions at law and in equity. Equity should not restrain against equity, and when an action in

equity is pending in a district court the rights of all parties interested may and should then be determined; but sometimes there may be good reason why a district court in an equity suit raising issues that cannot be determined at law,—should entertain jurisdiction and enjoin parties from proceeding at law; as for instance where the district court in the suit at law cannot try the issues or give the relief asked in the equity suit; or when two or more actions at law are pending in different district courts and the equity suit is instituted to settle and determine a controversy embracing the subject matter of those several actions.

In the latter case the question arises—in which district court should the equity jurisdiction be invoked, or must it be done in all? Does it require a multiplicity of suits, or will one suffice? The supreme court however makes no distinction whether the suit is at law or in equity, but hold generally that one district court cannot enjoin parties from proceeding in a prior suit in another district court.

The only remaining question to be determined is—can this court transfer the action to the Twelfth District Court so as to invest that court with jurisdiction? I can find no precedent or authority for this, and the rule to show cause must be discharged and the action dismissed.

NAGLE vs. MACY.

Twelfth District Court, for San Francisco Co., Nov. T., 1857.

MOTION TO SET ASIDE REPORT OF REFEREE.

Upon a motion to set aside the report of a referee if no rulings upon points of law nor exceptions appear, the motion must be denied provided the conclusions of the referee can be sustained upon any view of the facts reported.

On motion to set aside the report of a referee and for a new trial. The facts are sufficiently set forth in the opinion.

J. Satterlee, for plaintiff,

G. P. Fobes, for defendant.

NORTON, J.—This is an action of ejectment which was referred for trial, by consent of counsel, to a referee. He has filed his report in which he finds in favor of plaintiff. Motion is now made to set aside the report and for a new trial.

Neither party has shown a paper title, both relying on possession solely. In a case of this kind where a cause is referred, the parties should, on the reference, request the referee to rule upon the points which they desire to reserve for reliance on a motion to set aside the report or for any other purpose, and should request the referee to note their exceptions, and then in a motion of this kind these points could be made the grounds for the application, otherwise it will generally be impossible to know whether the finding has been the result of any error of law and the conclusions of the referee will be sustained if any possible view of the facts would authorise it. *Leavenworth*, plaintiff's grantor, was in possession of the premises in controversy some time in 1849, and sold to *Evans* and took back a mortgage. *Evans* being unable to pay, surrendered possession to *Leavenworth*, as he testifies. After this, *Leavenworth* brought an action of foreclosure in the district court of the fourth judicial district in which *Evans* appeared in open court and consented that a decree in accordance with the prayer of the complaint should be entered against him; this was accordingly done, and in pursuance thereof the premises were sold by the sheriff and bought in by *Leavenworth*. Before, however, the former had executed his deed to the latter, *Evans* died, thus avoiding the deed. *Leavenworth* retained possession of the lot for a time, and afterwards moved elsewhere leaving the lot vacant. Plaintiff subsequently, some time in 1854, entered on the premises and has retained them up to the present time. *Leavenworth* has since sold to plaintiff who brings this action to recover possession of the land, and the referee as before stated, finds in his favor.

On the argument of this motion defendant's counsel contended that the deed executed by the sheriff to *Leavenworth* after the death of *Evans*, being absolutely void should not have been admitted in evidence by the referee. Its admission however, it seems did defendant no harm, for the referee says in his report that it did not convey the title, which was vested in *Evans*, to *Leavenworth*,—so that upon whatever grounds the referee may have based his final conclusion, this deed

could not have been one of them, nor could it, as is apparent from the language of the report, have influenced the referee's judgment in any manner prejudicially to the interests of the defendant.

Inasmuch as defendants do not connect themselves with the outstanding title existing in *Evans* or in his representatives they cannot as a defense to this action avail themselves of it. The referee may have found that the surrender by *Evans* to *Leavenworth* invested the latter with a posssession which it did not appear that he had ever in a legal sense abandoned. However that may be, there are no such errors assigned as must necessarily overthrow the referee's report which is therefore confirmed. Let an order be entered accordingly.

DE WITT vs. SMARTZ.

Twelfth District Court, for San Francisco Co., Sept. T., 1857.

DEMURRER—STIPULATION.

The complaint in an action to obtain a decree to enforce compliance with the conditions of a stipulation made in another action between the same parties, must set forth all the facts of that action having reference to the subject matter of the stipulation, or it will be held bad upon demurrer. Whether such a stipulation, signed by the attorney, could be enforced at all by action, *quære.*

The complaint in this action sets forth, that in another action between these parties, a certain stipulation was drawn up and signed, and which is as follows: "In the District Court of the Twelfth Judicial District, of the State of California, in and for the City and County of San Francisco—

Christian Smartz,
Plaintiff,
vs.
Andrew De Witt and Henrietta Sophia Louisa De Witt, his wife,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the respective

parties to the above entitled action, by their respective attorneys, as follows, that is to say:

First.—That the plaintiff may and shall take a decree of foreclosure and order of sale of the premises described in the mortgage in the proceedings mentioned, as situated on Sutter, between Jones and Leavenworth streets, for the whole amount of the principal and interest secured to be paid in and by said mortgage. The said decree and order of sale not to be against either of the defendants personally, or against any other property than that above mentioned.

Second.—That the said defendant, *Andrew De Witt*, will and shall pay all the future costs of court in the said action, including clerk's fees, sheriff's fees, sheriff's commissions on sale, advertisements, costs of sale, and all other costs and charges that may become due in the entering and execution of the said decree of foreclosure and order of sale.

Third.—That the judgment in favor of the said defendant, *Henrietta Sophia Louisa De Witt*, against the said plaintiff, made and entered in the said action on the 9th day of May, A. D., 1857, shall, and the same is hereby remitted and acknowledged to be fully paid and discharged, and a due acknowledgment of satisfaction thereof shall be made and entered of record.

Fourth.—That the said plaintiff shall and will, and does hereby, release the premises mentioned and described in the said mortgage, as situated on Sutter street, at the corner of said street and Dupont street, of and from all and every claim and demand whatsoever, as well on account of the said mortgage and the debt thereby secured, as on all other accounts whatsoever; the said release to be duly made and acknowledged, so as to entitle it to be recorded.

Dated at San Francisco, this 9th day of May, A. D., 1857.

Glassell & Leigh, Attorneys for plaintiff.
J. B. McCabe and *J. C. Albertson*,
Attorneys for defendant, *H. L. S. De Witt.*
Andrew De Witt, in *pro. per.*"

This stipulation, the complaint goes on to aver, has not been complied with by the defendant *Smartz*, for that the release therein agreed

to be executed by the said *Smartz*, has not been acknowledged and recorded. It then alleges damage, and prays that a decree be entered to enforce the terms of the above stipulation.

General demurrer.

C. Burbank, for plaintiff.

H. McAllister, for defendant.

NORTON, J.—The complaint is altogether too vague and indefinite in its averments for the purposes of this action. To obtain a decree in order to enforce compliance with a stipulation entered into in another action, would require great care in drawing up the complaint. It would probably be necessary to set forth all the facts and circumstances of the cause in which the stipulation was executed, or at least all those having reference to, or affecting, the subject matter of the agreement itself. In this case it further appears that the stipulation in question was signed by defendant's counsel, and not by her personally. It may well be doubted whether an attorney *can* stipulate his client into a law-suit. It would seem that such a stipulation could only be enforced in the action in which it is given, although if an averment that the attorney entered into it with the special authority, or consent of the client, and upon a sufficient consideration, could be satisfactorily sustained, the agreement might be binding upon the latter, and liable to be enforced by action.

Demurrer sustained, with leave to amend upon payment of costs.

PALMER VS. MELVIN.

Fourth District Court for San Francisco Co., Dec. T., 1857.

UNDERTAKING.

An undertaking given to release goods seized under process of attachment, may be void, as a statutory undertaking, but yet, if it is founded upon a valid consideration, it may amount to an original obligation at common law upon which an action may be sustained.

This action was brought upon an undertaking given to release an attachment and which defendants defend on the grounds, that the undertaking was not made in pursuance of the direction and requirement of the statute.

C. H. S. Williams, for plaintiff,

Lockwood & Wallace, for defendant.

HAGER, J.—As a statutory undertaking, the obligation sued upon is defective and informal, but at common law it must be regarded as an original undertaking, founded, as has been proven, upon a valid and sufficient consideration, whereby a liability has been created by the voluntary act of defendants. In this view of the case, plaintiffs are entitled to recover, if defendants have failed to perform their agreement, for the damages they have sustained, not to exceed the sum mentioned in the undertaking, Judgment accordingly.

BERNSTEIN vs. GOLDSTONE.

Ninth District Court for Shasta Co., Sept. T., 1857.

COSTS—SLANDER.

The provision of the statute restraining the allowance of costs to the plaintiff when he recovers less than $200, does not apply to actions where the damages are but the incident and not the subject of the action.

Though costs may be allowed yet the party must file his bill of costs within the two days, or in that time get an extension from the court for a delay.

A verdict of ten cents damages in an action for slander, will carry costs.

This was a motion relative to a bill of costs, filed in the above action, brought for slander, wherein the jury found a verdict for the plaintiff, and assessed the damages at ten cents. The bill was filed after the two days allowed by law.

Combs & Garter, for plaintiff.

Sprague & McMurtry, for defendant.

DAINGERFIELD, J.—The verdict in this case carries costs, and is not one of those cases provided for in sec. 495 of the practice act. Where damages are but the incident, and not the subject of the action, a judgment will carry costs, particularly where there is no other court before which the suit could be prosecuted. A justice of the peace has no jurisdiction in an action of slander. Thus, in actions commenced with an injunction to restrain waste, and damages are claimed as an incident, a verdict in any amount will carry costs.

In this case, however, the plaintiff failed to file, within the two days after judgment, his sworn bill of costs, and it cannot be filed after that time has elapsed, unless leave had been given by the court, within the two days, to file the same, after that time.

PARTRIDGE vs. McKINNEY.

Ninth District Court, for Shasta Co., Sept. T., 1857.

ABANDONMENT OF A MINING CLAIM.

There must be proof of an intent to abandon, or the act of abandonment for five years, to divest a party of his right to possession of a mining claim.

The facts in this case are substantially as follows: The plaintiff and *Townsend*, one of the defendants, were the prior owners of the property in dispute. *McKinney* and *Elmore*, the other defendants, bought of *Townsend* and took possession of the plaintiff's claim. *Townsend* claims that the plaintiff had abandoned the property and forfeited his rights, and that he became the successor in interest of plaintiff's portion and as such had the right to convey to *McKinney* and *Elmore*, who thereby acquired from him title to the plaintiff's portion, which, by abandonment, passed to him. The proof showed that the plaintiff and *Townsend* had subjected the property to their use.

It was also shown that *Townsend* was the agent of *Partridge*, and that *Partridge* had only been absent from the county eighteen months.

Sprague & McMurtry, for plaintiff.

Garter & Combs, for defendant.

DAINGERFIELD, J.—There must be proof of *actual* abandonment on the part of the plaintiff, or he must have absented himself for the period of five years before the law would presume an abandonment, if he had once established an ownership by actual possession.

Leaving the claim, even for a day, with the intention of not returning, would be an abandonment. It is the intention alone which constitutes an abandonment until the statute of limitation applies, and unless an intention to abandon is shown by acts or words, the law will not presume it until such time as the plaintiff would be barred from maintaining an action for the recovery of the property in dispute. Inasmuch as *Townsend* was the agent of *Partridge*, no length of time would give him the right to the property so that he could deed it to another who had knowledge of the agency, for the property could never be *abandoned* as long as the rights of plaintiff were represented. *Qui facit per alium facit per se*. *McKinney* and *Elmore*, therefore, took no rights by deed from *Townsend* to any property claimed by plaintiff.

Judgment accordingly.

GREEN vs. COVILLAUD.

Tenth District Court for Yuba Co., Nov. T., 1857.

CONTRACT TO CONVEY — LIMITATION.

A contract to convey by a "good and sufficient deed," is only an obligation to pass whatever title the party has, and does not justify a demand for "a clear and perfect title."

A demand for the title to be conveyed, coupled with a tender of the balance due of the purchase money within reasonable time, and often afterwards repeated, will excuse what may appear as an unwarrantable delay in bringing an action to enforce rights under the contract.

The statute of limitations in this State does not expressly include in its provisions an action for specific performance of an agreement to convey real property.

A claim to land can never become so stale as to be barred by the statute of limitations when the party is in possession of the land, asserting his right thereto.

The fact that the grantor paid the taxes on the land he agreed to convey, does not of itself, show an abandonment by the grantee.

Where the grantor postpones the performance of the contract, and delays its execution and induces the grantee to acquiesce therein, by representations to him, the grantor cannot set up this delay as a *laches* of the grantee.

The opinion contains a full review of all the facts in the case.

Lindley & Hatch and *Bryan & Filkins*, for plaintiff.

Reardon, Mitchell & Smith, for defendant.

BARBOUR, J.—This is an action to enforce the specific performance of a contract to convey land. On the 1st day of January, 1851, the defendants, *Charles Covillaud*, *Jose M. Ramirez*, *William H. Sampson* and *G. N. Lovejoy*, together with *R. B. Buchanan* (since deceased,) and *C. B. Sampson* (since declared to be of unsound mind,) executed under seal and delivered to the plaintiff, *Isaac Green* and to *J. M. Turney*, *Ezra Bligh* and *Thomas Elrod*, a bond in the penal sum of six hundred dollars, conditioned for the conveyance of a certain tract of land situated in Yuba county, on the Yuba river, and embraced within the limits of a Mexican grant, the said tract of land containing two hundred and twenty-six (226) acres, more or less. As a consideration for the land, the said *Green et al.*, paid one hundred dollars to their vendory at the time of the execution of the bond, and also made and delivered to them, their joint promissory note for the balance of the purchase money, amounting to six hundred and six dollars, payable the 1st day of October, 1851.

By a mistake, which is evident, there is a discrepancy between the amount stated in the note and that recited in the bond, the latter being for a different amount. At the time of the contract between the parties, the defendant *George G. Briggs*, had a few acres of land enclosed with a fence, and was living upon it, in a small house or camp. He was apprised of the contract between the parties to the bond and note, and knew he was upon the land described in the bond. He was notified by both parties to quit and surrender the possession of the land in his inclosure, and warned not to make any further improvements.

Green, *Turney*, *Bligh* and *Elrod* went into possession of all the land purchased by them (with the exception of the portion occupied by *Briggs*,) under the bond and with the knowledge and consent of their vendors. They and their successors in interest, have continued in possession ever since, improving and cultivating the land, and claiming title under the bond. The defendant, *Briggs*, has also continued in the possession of that part of the land originally taken by him, and has

gone on to improve the same, contrary to the urgent remonstrances of the other parties.

The *Cordua* grant was confirmed by the U. S. Board of Land Commission on the 27th of March, 1855. Within a few days after the confirmation of the grant, *Green*, claiming an interest in the land under the contract or bond, *made a legal tender* to all the defendants, including *C. B. Sampson*, (who was then in his right mind,) of the whole amount, including principal and interest due upon said promissory note, as described in the bond, and demanded a deed of the land, which was by the defendants refused. Subsequently to this the defendants conveyed to the said *Briggs* so much of the land as was already in his possession.

There is no evidence that the note was ever presented for payment to the makers, or any demand thereof was made. The evidence shows that sometime in the months of January or February, 1852, one of the parties who claimed an interest in the land under the bond, carried money to the said *R. B. Buchanan* and *W. H. Sampson*, and demanded a deed, and at the same time offered to pay the note, and that they, *Buchanan* and *Sampson* told him, that they *could not give a deed* for the reason that they had not then a good title—that their title was in dispute; but that as soon as it was perfected, they would take the money and execute a deed. It is also proven that a few days afterwards the same party saw the defendant, *Covillaud*, and asked him when he intended to give a deed to the land, and that *Covillaud* said, in reply, that they (meaning the ranch owners,) *had determined not to take any money, or to execute any deeds to land until the title was confirmed, and that then they would give a deed to the land.* It is also in proof that one of the parties claiming an interest in the land and bond, sometime in the summer of 1853, went to defendant, *Ramirez*, and offered to pay the amount due on the note, and desired a deed, which was refused, *Ramirez* assigning the same reasons, and remarking that their title would soon be settled, when they would receive the money and make a deed.

This case is similar in some respects, to that of *Brown* v. *Covillaud*, decided by this court a year ago. The decision in that case, predicated upon what I conceive to be good law, was by our supreme court reversed.* Without intending any disrespect or want of confidence in

*6 *Cal.*, 566.

the ability of the learned justices who concurred in the opinion in that case, much less to the memory of the late lamented chief justice, who delivered it, I must be permitted to say, that I regard their decision as in conflict with the settled law—as irreconcilable with the *former opinions* of that court, and as repugnant to the plainest principles of right and justice. I am sure the opinion of the court must have proceeded upon a misapprehension of the facts contained in the record.

The true rule of law in cases like that of *Brown* v. *Covillaud*, and which the court seemed to have overlooked in deciding that case, was very clealy defined by justice HEYDENFELDT; (in the case of *Gouldin* v. *Buckelew*, 4 *Cal.*, 107. The facts in that case differ in no material respect from the facts in *Brown's* case.) Judge HEYDENFELDT in deciding the case, says: "This case must be decided by a simple solution of the question, what was the vendor's relation to the land after his sale? According to sound principles of equity, sustained by a long current of decisions, he was the vendor with an equitable lien upon the land for the purchase money, and holding the legal title as a security for the enforcement of his lien, (5 *Porter*, *p.* 469; *Chapman* v. *Chunn.* 5 *Ala.*, (*N. S.*) 397.) The vendor in this case had several remedies: he might have recovered possession of the premises, in which case he could only have held until the rents and profits had paid the purchase money, and then equity would have compelled him to convey to the purchaser. He might have enforced his lien in a court of equity, in which case, if the sale had produced more than the purchase money, the surplus would belong to the vendee. * * * The argument that the length of time which elapsed without payment of the purchase money, demands the inference that the contract had been abandoned, is of no force. It was within the power of the vendor to have rendered the time as short as he chose, by a prompt enforcement of his lien."

It was in conformity with this rule of law so forcibly stated by judge HEYDENFELDT, and concurred in by chief justice MURRAY, that this court decided the case of *Brown* v. *Covillaud*, a case standing upon the same facts disclosed in *Gouldin* v. *Buckelew*. If the decision on appeal in the *Brown* case stands, the doctrine which the learned justice says is "sustained by a long current of decisions," falls to the ground.

But however much I may differ with the supreme court in its conclusions of the law, as announced in the opinion overruling my decision in the *Brown* case, I should feel bound to respect them, as authority in this court, and rule accordingly upon a case in every way similar. This case which I am now considering, is not such a case, although it has many of its features. In that case the plaintiffs, although in possession of the land, under a contract to purchase, suffered near four years to elapse, after the maturity of the note given for the purchase money, before they made a tender of the amount due upon it. As a justification of this long delay, they contended that the defendants had not, during that time, such a title to the land as to enable them to give a "good and sufficient deed;" that their title consisted in a Mexican grant, which was in litigation, and about which there was much doubt and uncertainty. This they proved; but the supreme court held, that the words "good and sufficient deed," only referred to the form of the deed, and not to the *interest* intended to be conveyed; that the defendants only obligated themselves to pass their title, whatever it might be, to the plaintiffs; and that therefore, the plaintiffs were not justified in postponing the payment of the purchase money, upon the ground the defendants could not give a *clear and perfect title;* that is to say, that a covenant to make a "good and sufficient" deed, does not imply that the vendor must convey to the purchaser a *complete* and *perfect* title, and under such a contract he might, if he chose, simply *quit claim.* I must contend that the authorities are against this position of the court, but conceding that they are correct in the meaning which they attach to the words "good and sufficient deed," then the objection cannot be taken in the present case, for the offer of plaintiffs to pay the money due on their note within four or five months after its maturity, and again in the summer of 1853, and their repeated demand for the deed, while the defendant's land was in litigation—all show that the plaintiffs were willing to take such title as the defendants had—clouded and embarrassed as it confessedly was, and to run the risk of its confirmation themselves.

But it is contended in this case, that time is so far the essence of the contract, that the plaintiffs having failed to pay their note on the day of its maturity, absolutely forfeited all their rights to a performance of the contract to convey. This is a harsher construction, perhaps, than

was ever contended for before upon a similar contract in a court of equity. The supreme court in the case above referred to, say: "That to determine whether time is essential in such cases, we are not to look at the letter of the contract alone, to ascertain the intention of the parties, but to the circumstances under which the contract was made, and to the facts and circumstances which have transpired since its execution." The court, in that case, further say: "That although the bond itself, under which the plaintiffs claim their rights, binds the defendants to make a deed on the payment of the note at its maturity, yet this *language of itself*, would be *insufficient* to establish the fact that the payment of the note at a *precise point of time*, was an essential element in the contract; that it should be taken with other facts and circumstances to establish the true intention of the paties."

When the intention of the parties is to *control* the question whether time is a necessary and essential ingredient of the contract, how did defendants regard it? Did they not regard the contract as a good and subsisting one, when four months, and when again, two years after the maturity of the note, the plaintiffs demanded a deed, and offered to pay their note, they, the defendants, refused to take the money, and refused to make a deed; not objecting to the lapse of time; not claiming an abandonment of the contract, but excusing themselves upon the ground that they had no title, and satisfying the importunities of the plaintiffs with assurances that their title would soon be settled, and by promises that when it was settled, they would give them a deed? There was no abandonment of the contract in this. There was from the testimony no intention to hold the plaintiffs to the letter of the bond. But there was an *express acquiescence in the delay* which stamps the character of the contract. 1 *Johns. Ch.*, 370.

The defendants prove in defense to this action, that money was worth four per cent. per month at the time the plaintiff's note became due, and that they made the sale of the land to plaintiffs at a price below its real value, in order to get money to meet their necessities. If this was true, why did they not take the money when it was offered them in January or February, 1852? Why refuse it then? Because the contract was abandoned? No. They recognized it as valid, and by their acts and declarations expressly waived the time mentioned in the bond for the consummation of the contract.

But it is contended that the plaintiffs' right of action is barred by the statute of limitations. It will be seen by reference to the statute of limitations in this State, that in no one of its provisions does it expressly include an action for specific performance of an agreement to convey real property. The rules prescribing such actions must be sought elsewhere. They are to be deduced from decisions where the extent to which the rights of parties to equitable relief have been affected by their *laches*, has been the subject of adjudication. "The statute of limitations does not operate expressly on suits for specific performance, but lapse of time does, and the length of time is governed by the circumstances of each particular case." 13 *Tex.*, 463.

It is well settled that the statute of limitations never applies where the relation of trustee and *cestui que trust* exists, as in this case, the defendants holding the legal title in trust for the plaintiffs. To take it out of the statute, the trust must be such a one as is created and sustained by the principles of equitable jurisprudence, exclusive of common law cognizance. "If the legal title is in one, in trust for another, the trust cannot be enforced, but by a resort to equitable jurisdiction." 11 *Tex.* 434; 7 *Johns. Ch.*, 8, where the rule is settled as to the application of the statute of limitations to such actions as this.

But again: can the statute run against one in possession with an equitable title, under a contract to purchase? The object of the statute of limitations is to bar neglected and stale demands. Can a claim to land ever become *stale*, when the party is in the actual and notorious possession of it—asserting his right to it every day and hour—having it enclosed, living upon and cultivating it? Never, with one exception, viz: *Brown* v. *Covillaud.* The statute cannot apply in such cases, for the want of reason in it, and when the reason of the rule ceases, the rule itself ceases.

But let us offer a violent supposition, and say that the statute did apply in cases like this one, even then the plaintiffs, I take it, would be entitled to relief upon the ground of fraud. The evidence shows that they were induced by the representations of the defendants to postpone their right of action. This they did under repeated and solemn assurances, and promises from the defendants, that when the title was confirmed, they would deliver up the note, receive the money and execute a deed. The defendants cannot take advantage of the confidence re-

posed in their promises, and of a delay on the part of the plaintiffs, superinduced by representations which the law must pronounce fraudulent.

It is urged that the defendants have paid the taxes on the land, it having been uniformly assessed to them; and evidence of an abandonment on the part of the plaintiffs is sought to be deduced from this fact. This objection may be answered by the fact that the legal title was still in the defendants. This being the case, the property was properly assessed to them; and it could not, with reason or justice, be required of the plaintiffs to pay the taxes on land to which the defendants were constantly refusing to give them a deed, and assigning as a reason that they themselves had no title, or at least an imperfect title.

It may here be stated that the decision in the case of *Brown* v. *Covillaud* proceeds mainly upon the ground, that there was an *abandonment* of the contract on the part of the plaintiffs. That was the material point in the case on which the decision turned, as will be seen by reference to the opinion. If the facts in that case showed that there was an abandonment of the contract on the part of the plaintiffs, (which I certainly am not willing to concede, unless it is true that a party in possession can be adjudged by mere implication to have abandoned his contract to a piece of land upon which he has resided since the date of its execution, and finally sues to enforce it,) clearly there is nothing in the present case to justify a similar conclusion. On the contrary, all the evidence here goes to show that the plaintiffs have, from the commencement, insisted upon and asserted their rights under the contract.

Upon a full consideration of all the facts and circumstances, as well as the law which I think is applicable thereto, I feel constrained to grant the prayer of the plaintiff's complaint, and shall decree accordingly a specific performance of the contract.

BILLS vs. LOCKWOOD.

Fourth District Court for San Francisco Co., Dec. T. 1857.

NEW TRIAL ON CONDITION—REDUCING EXCESSIVE DAMAGES.

On motion for a new trial, when it appears the damages awarded by the jury are excessive, the court may order that unless plaintiff consent and stipulate, within a specified time, to reduce the damages to an amount named, and to enter judgment for that sum, a new trial will he granted.

This action was tried in the late superior court. It was for the recovery of the possession of certain goods and chattels, damages, &c. The jury found the value of the property to be $1,700, and the damages for its detention $1,300, and that plaintiff was entitled to recover $3,000.

Cook & Fenner, for plaintiff.

Reynolds, for defendant.

HAGER, J.—This action was tried in the late superior court. Among the grounds relied upon in support of this motion are errors of law, alleged to have occurred during the trial. Heretofore, I have announced my unwillingness to interfere with the rulings and judgments of the superior court, even should I differ in opinion, except when the error is plain and obvious. The questions of law raised and argued in the briefs had better be passed upon by the supreme court. After carefully reading the statement, I think the verdict is not supported by the testimony: the damages awarded are excessive, and unless the plaintiff consents and stipulates, within five days, to reduce the damages one thousand dollars, and that judgment be entered for this sum, in lieu of the three thousand awarded by the jury, I shall consider it my duty to order a new trial. If this is done, the new trial will be denied.

INCHES vs. VAN VALKENBURG.

Fourth District Court for San Francisco Co., Dec. T. 1857.

ATTACHMENT—RENT—EJECTMENT.

An action to recover real property, rent in arrear due upon a lease of the same property and damages, is not an action upon a contract for a direct payment of money within the meaning of our attachment law, and it is irregular to issue an attachment thereon, and attach defendant's property as security for the satisfaction of the judgment plaintiff may recover.

Motion to discharge an attachment on the ground that it could not be issued in an action of ejectment.

The complaint contained but one count, for the recovery of the possession of real property, rent in arrear due on a lease of the same and damages for the detention thereof.

A. T. Willson, for plaintiff.

H. S. Love, for defendant.

HAGER, J.—This action is brought to recover the possession of real estate, rent in arrear and damages. The complaint contains but one count in which the different causes of action are set forth, but they are not separately stated, as is required by § 64 of the practice act. It is alleged that the rent in arrear is due upon a contract of lease, and plaintiff contends that he is entitled to an attachment under the provisions of our statute. The principal relief sought is the recovery of the real estate; subordinate and dependent upon that is the claim for rent and damages. Should plaintiff fail to recover possession of the property, he cannot, upon this complaint, recover either the rent or the damages claimed. The action is not then upon an express or implied contract for the direct payment of money within the meaning of the attachment law.

The writ of attachment was issued without authority of law, and must be discharged.

PEOPLE vs. BUSH.

Ninth District Court for Trinity Co., Dec. T., 1857.

TRANSFER OF CAUSES—CONSTITUTIONALITY OF THE LAW AS REGARDS INFERIOR CRIMES.

The act which provides for transferring a criminal action from the court of sessions to the district court of the county by reason of one or more of the judges being disqualified, is not warranted by the constitution.

When such a transfer is made, a motion to dismiss the cause will be granted; consent can confer no jurisdiction.

Motion to dismiss the cause for want of jurisdiction in the district court to hear and determine the same. The facts are set forth in the opinion.

Callagher, district attorney, for the people.

Pitzer & Burch, for defendant.

DAINGERFIELD, J.—This is an indictment for a misdemeanor for keeping a house of ill fame, and a motion is made by the defendant's attorneys to dismiss the same, for the reason that the district court has no jurisdiction to hear and determine the subject matter.

The case was removed from the court of sessions by order of that court, because that court, by reason of prejudice existing in the minds of the judge and justices against the defendant, (as shown by her affidavit on file,) was such, that a fair and impartial trial could not be had in the court of sessions.

The motion was made under a provision of the statute. See *Wood's California Digest*, 153, art. 666, § 54. Indictments found in the court of sessions shall be transmitted to the district court sitting in the county, for trial in the following cases: 1st. Whenever a judge or justice of the court of sessions is by law disqualified from hearing or trying the same. 2d. Indictments found against a member of the court of sessions, or any justice of the peace of the county.

This provision cannot give jurisdiction to the district cour in actions of this kind, for the reason that the constitution fixes the jurisdiction of the district court, and the acts of the legislature limit that jurisdiction

to *crimes* of a higher character and nature than mere misdemeanors, which are triable before justices of the peace, and courts of sessions, in the country, and mayors' and recorders' courts where they exist.

The construction which I place upon the law quoted is, that where the district court has jurisdiction over the *subject matter*, then indictments shall be thus transmitted, but in all *other* cases, they shall be sent to an adjoining county.

But it is urged by the district attorney, that the change was made on application of defendant, and that although, as a court, I might have no such power, still, as a judge, commissioner or referee, I may decide the case. To this I reply, that "consent cannot give jurisdiction," and although probably it may be considered as sharp practice in the defendant to have made this motion, still it was a legal right which she had, and the court of sessions was the guardian of the people's rights, and the district attorney has nothing of which he can complain. The law might admit of the construction given it by that court, and as the rights of the people can be protected by another indictment, I shall order that the cause be dismissed.

If this court had jurisdiction of the offense, I should hold the party to answer before another grand jury, but as I think I have not, I see no other course left me than to dismiss the case.

Let the order be so entered.

PEOPLE vs. POTTER.

Ninth District Court for Trinity Co., Dec. T., 1857.

LIABILITY OF SURETIES—ASSESSOR AND POLL TAX—OFFSET.

The sureties on a bond of a person as county assessor alone, are not liable for his acts and omisssons as poll tax collector, there being a special provision in the statute requiring an additional bond for this latter duty.

In an action particularly averred for refusing to pay over moneys collected as poll tax, these sureties cannot be made liable.

A county assessor cannot offset against the payment of moneys collected for poll tax, (a separate duty entirely) whatever sum may be due him by the county as assessor.

The defendant as county assessor of Trinity county, collected a sum

of money for poll tax from the citizens, and when demanded to pay the same over to the treasurer of the county, according to law, claimed to offset against the amount collected, his pay for services as assessor, at ten dollars a day, which the supervisors had allowed, but was not yet paid.

This action was brought against the defendant and the sureties on his official bond as assessor, to recover the amount of poll tax collected. The assessor set up a denial, and offset, and admitted that he was acting as assessor of Trinity county.

J. Callagher, district attorney, for the people.

Pitzer & Burch and *Chadbourne & Howe*, for defendant.

DAINGERFIELD, J.—In this case there are raised two questions. The first, are the sureties bound? I think they are not, for the following reasons, which I shall briefly state. The bond is conditioned for the proper performance of the duties of the office of assessor, and not for all the duties that may be assigned to him by law, and there is a special provision in the statute *requiring* an *additional* bond to be given for the collector of poll tax. This provision expressly negatives the presumption that the sureties are bound for his acts; besides, the statute in enumerating the acts for which the sureties are bound, expressly omits this duty. This action is for default in the performance of a duty *particularly named*, to wit: for failure to pay over money which it is alleged the defendant collected, viz: poll tax. He, the defendant, seeks to file as an offset, a claim which is allowed him by the board of supervisors for acting as assessor of Trinity county. I do not think this can be done, for the reason that the law, having appropriated this poll tax fund for a special purpose, it was passed beyond the control of the board of supervisors, under the decision of the supreme court, and they have no right to allow a claim, (if any exists,) against the general fund, to be offset against a special fund. The law gives a specific allowance, to wit: fifteen per cent. for collecting poll tax, and the assessor cannot get anything more for performing this duty than is allowed by law, although he may receive ten dollars per day for assessing property. The general fund of the state and county may be bound for this bill, which is sought as an offset, and the board of supervisors

also might, if they have moneys in their hands belonging to the state. But they cannot divert the revenue of the state from the use to which the legislature has assigned it. The board of supervisors are, it is true, agents of the state, as well as the county, but they are only special agents with clearly defined powers, and cannot go beyond them. The judgment of the court, therefore, is: that the plaintiffs have and recover of the defendant, *D. W. Potter*, the sum of twenty-four hundred and forty dollars and six cents, with interest thereon from the 7th day of December, 1857, together with costs of suit, and that the defendants, *C. P. Rice*, *J. A. Sturdivant*, *L. J. Kellogg*, and *T. Neathery*, recover their costs of suit against the plaintiff, and farther this court saith not.

HAMBLIN vs. HAMBLIN.*

Ninth District Court for Yreka Co., Nov. T., 1857.

DIVORCE—ALIMONY.

It is extreme cruel treatment to accuse a wife of prostitution or to question her chastity. Unless there is proof of the marriage before the court, a decree for alimony cannot be made.

The facts are set out in the opinion.

Rosborough & Berry, *E. H. Stone*, and *I. D. Cosby*, for plaintiff.

G. W. S. Cummings, *W. D. Fair* and *I. D. Turner*, for defendant.

DAINGERFIELD, J.—In this case I confess that I have very great difficulty in arriving at the facts from the evidence, as the testimony upon the only two points relied on is very conflicting. There is evidence on the one side, that the defendant was, up to the time of bringing this action, habitually intemperate; whilst, on the other, persons of equal respectability and credit, testify that he was not addicted to excessive drinking. And were this suit to be determined on that ground alone, I should certainly find a verdict for the defendant, for I

*See Pursely *vs.* Pursely, vol. 1 : 52; Gaskins *vs.* Gaskins, ib. : 381.

do not think that the evidence in support of the defendant's intemperance, or of his habitual intemperance, preponderates; and I think that public policy is against the granting of divorces, unless in cases fully made out.

Then, is there any other ground which the statute recognizes, upon which the complainant can rely? The statute of California, on the subject of divorces, recognizes many causes, among which is that of "extreme cruelty," and it is upon that last ground that the plaintiff must recover judgment, if at all, that being the only other cause assigned in this complaint, why a divorce should be granted. Upon this latter ground, however, at "first blush," the evidence would seem to be equally conflicting. But is it so? It is true that about an equal number of witnesses testify to the kindness of the defendant to the plaintiff, (and probably more,) than testify to his unkindness; but one witness, and he introduced by the defendant himself, testifies that the defendant did charge the plaintiff with an act, which, in the absence of proof of her guilt, is, in the eye of the law, the grossest act of cruelty which can be perpetrated against an innocent female. It is in proof by one witness (*Mr. Frink*,) that the defendant charged the plaintiff, in effect, if not in the very words themselves, with the crime of adultry, and the letters of defendant to the plaintiff plainly refer to the same charge.

It is true that even such an act as making a charge of this kind may be condoned, but until it is retracted it remains the grossest act of extreme cruelty which it was within the power of the defendant to inflict.

There is no evidence that it ever was retracted, or that the parties ever lived together afterwards, and assumed towards each other the relations of man and wife. The confessions and acknowledgments of the plaintiff of the kindness of her husband, were all anterior to these dates, so that the plea of condonation cannot be supported. Whilst I do not believe that the policy of the law is to grant divorces for slight cause, I do believe that it is a duty which courts and juries owe to society to see that woman is respected, and that all good citizens should aid in her elevation, and that every legal means should be brought to the advancement of that object. Even if one were so base as to be willing to live with a woman whom he had disgraced by calling her a

whore, and should seek to apply the sacred name of wife to her, courts of conscience should not enforce the gratification of such a desire, especially where she protests against assuming such a relation. Nor would a court be justifiable to subject her to the treatment, the reviling and contumely which one of right might inflict upon a woman whom he had thus degraded. Then as a matter of fact from the evidence, I find that the charge of "extreme cruelty" from the defendant towards the plaintiff has been fully made out, and as a matter of law therefrom, that the plaintiff is entitled to her divorce.

With regard to the further prayer of the complaint, to wit: that she be allowed alimony, and a division of the common property, I hold that there is nothing before me upon which to base a decree. There is no averment that there is joint property acquired since coverture, or that he (the defendant) has any property at all. Nor is there any proof of a marriage between the parties. It is true that the evidence shows a *prima facie* case of marriage. The fact that they lived together and maintained towards each other the relation of husband and wife is shown, and this showing for the purpose of giving a right to *sue* is sufficient; but where the right to property is claimed, a *clear legal right* must be shown, which can only be done by proving a legal marriage. It is true, that for certain purposes, as a matter of public policy, courts have ruled that the fact that a man holds out to the world a woman as his wife, shall raise such a presumption of marriage that courts will hold him responsible for her debts; but this is *inter alios*, on the principle that the law will not permit third persons to be imposed upon by the acts of the man holding himself out as a husband, for he has it in his power to let the facts be known; but between the parties themselves no such policy is involved, and the proof is within the reach or under the control of the party desiring it. So that in cases where a woman seeks to recover property which she would only be entitled to by reason of the fact that she was a wife, she must not only allege the fact, but prove it; and the same rule will apply to her which applies to real actions and to "all actions," that she must recover on the strength of her own right. But were we in doubt as to this matter, the amendment to the law of divorce, passed in 1857, I think settles this question. There was no *proof of marriage*, and the only evidence before the court was of the acts of the parties, which would only raise a legal

presumption, such as I have before referred to. The amended statute is imperative on this subject, and requires *proof* of every fact; and the party defendant could not, even by confessing the truth of the bill, relieve the plaintiff of the *onus probandi*.

For these reasons, which I have very hurriedly stated, I shall grant a decree of divorce from the bonds of matrimony, but shall deny all other relief prayed for in the plaintiff's bill. Let each party pay his or her own costs.

Let a decree be so entered.

PEOPLE vs. LYNN.

Ninth District Court for Trinity Co., Dec. T., 1857.

DEMURRER—OFFICIAL BOND—ALTERATION.

In a complaint upon an official bond, where it appears that there has been an erasure of the name of one of the sureties thereto, which is not averred—advantage of the defect should be taken by demurrer.

This applies only to those sureties who signed above the name erased, but not to those below.

A bond whereupon the right of action exists against any or all of the sureties, is not void but voidable only by reason of the erasure of one of the signatures thereto.

On the trial of an action on such a bond, the sureties may show the erasure by the record and the burden of accounting for it satisfactorily devolves upon the plaintiff.

The action is brought by the state against *Lynn* and his sureties, in which it is alleged that as treasurer of Trinity county he has received moneys belonging to the state, which he has failed to pay over.

Profert is made of the bond, from which it appears that the name of one of the sureties has been erased, or that a line has been drawn across the name of one *Batchelor*, whose name appears as surety. *Batchelor*, however, is not made a defendant, the bond being joint and several.

The defendants demurred, and for causes of demurrer alleged—

1st. That there is a defect of parties defendant, it appearing from the supposed official bond copied in said complaint, that the same was originally executed by another person who is not made a party defendant.

2d. That the said complaint does not state facts sufficient to constitute a cause of action, in that it appears from the facts of said complaint that the action is brought upon a supposed official bond, the name of one of the sureties upon which has been erased, and no facts set up showing how, why or by whom said erasure was made or accounting therefor, in any manner.

Sprague & McMurtry and *J. Callager*, for plaintiff.

Pitzer & Burch and *Chadbourne & Howe*, for defendants.

DAINGERFIELD, J.—With regard to those who signed above the erasure, I have no hesitation in deciding that the demurrer is not well taken as to them, but as to those who signed below there is more doubt, and this question must depend upon the fact, whether the bond is *void* or only *voidable*, as to them, as the ground taken in the demurrer is, "that the complaint does not state facts sufficient to constitute a cause of action."

The rule of law is, that where a defect is patent upon the face of the complaint, advantage must be taken thereof by demurrer, and if from the statement of facts apparent on the face of this complaint, the people have *no cause of action*, then the demurrer is well taken, but if they may have a cause of action, then advantage must be taken of the defect in the cause of action by answer. Then applying these premises to the law of the case, is demurrer the proper remedy, or will the defendants be required to answer? The decisions upon this point seem to be somewhat conflicting, but the current of authorities seem in favor of the position that this instrument is not absolutely a void one, but voidable; particularly would this seem to be the case under statutes giving the right of action against *any or all* of the sureties. From all the authorities introduced, (and certainly very great industry has been shown in their collection,) I think I can give the following general rule, which is founded upon reason as well as authority:

That where an alteration has been made which is patent upon the instrument itself, and which would affect the party offering the instrument in evidence, or seeking to recover on it *advantageously*, the court would pronounce it void *absolutely*, particularly where the party offering it has been its custodian, as the law will not permit such a premium

to be offered for *perjury*, as any other course would hold out; but where the alteration is *against* the interest of the party offering it, no such presumption is raised, and the instrument is only *voidable*.

In the first case the instrument being insufficient in point of law to maintain a suit, a demurrer would be sustained, but in the latter the instrument being only voidable, and only *void in a certain showing of facts*, advantage must be taken by answer when proof *aliunde* might be introduced.

In the one case the instrument itself would be evidence that the plaintiff could not recover; in the other, proof would have to be introduced showing that he ought not to recover.

This bond, therefore, presents the two insignia of which I have spoken, and will have to be governed on the hearing by both rules. The alteration made in the instrument being made against the interest of those whose names appear on the bond after the alteration, they will only be required to show the alteration by the record, and then it will devolve upon the state to show that it was made before the signing by them, or they will not be held liable for any portion of the debt, but as to those obligors who signed before the apparent erasure, no such burden will be imposed, unless the people produce proof that the alteration was made after it was an entirety.

Most of the cases cited by counsel are suits between individuals, it is true, but then I can see no reason, particularly under our California statute, for a more stringent rule against the state than against individuals, and as the object of all law is to administer justice, and no substantial rights can be affected, I shall overrule the demurrer and give the defendants leave to answer. Another view which may be well taken in this case is, that even on the face of the paper it does not absolutely follow as a matter of law that any alteration which would affect its legal force has been made in the instrument. True, there is an erasure of the name of *Batchelor*, but *Story on contracts* § 1000, and 1 *Greenleaf on Ev.*, 564, lay down the law to be that the presumption of law is, that the alteration was made at the time of the execution of the instrument. If that be so, it follows that so far as the papers in this case show, the defendants knew of the alteration when they signed it, and consequently are bound by their acts until the pleadings raise the issue of fact. I, however, am of the opinion that

the general issue would be sufficient to throw the burden of proof upon the state, and that in order to bind those obligors who signed below, (the fact being admitted that those below signed after those above,) the state would be required to account for and explain the alteration. So far as the responsibility of *Batchelor* is concerned, to the state, were he sued, I am not called upon to decide, but his responsibility to the state and to the other obligors upon the bond, will not depend upon the same evidence ; but if his liability once attached, I doubt the justice to those who were bound with him of permitting him by his own act and without the consent of those interested, to escape responsibility.

Let an order be made overruling the demurrer.

McKINNON vs. COOK & ZABRISKIE.

Twelfth District Court for San Francisco Co., Nov. T., 1857.

TROVER—ADVERSE POSSESSION—ATTORNEY AND CLIENT—FRAUD.

A party sold to another personal property, which at that time was in the possession of third parties, who held and claimed it, adversely to the vendor; *held*, that the vendee received a valid title, and could maintain an action in his own name for the recovery of this property.

In an action in the nature of *trover*, the plaintiff can recover only the specific property claimed, and must also recover the whole of it, and where an action of this nature was brought by the assignee of a box and its contents, to recover possession of the same—*held*, that if the *title* to any portion of the contents had passed from the assignor to the defendants, previous to the assignment by the former to plaintiff, then the latter could not recover the residue of the property, nor any portion thereof.

In all transactions between attorney and client, the strictest good faith must be observed. To coerce, impose upon, or take an undue advantage of the client's condition, whether arising from over excitement, or otherwise, will avoid any contract, however reasonable, which they may have made.

Attorney and client, under our statute, are at liberty to make any contract with regard to the manner of the compensation of the former which they may deem fit. In all contracts and transactions made and carried on between attorney and client, if the interests of the former appear to have been promoted to the apparent neglect of those of the latter, it raises a presumption of fraud against the attorney, and throws upon him the *onus* of showing that he has acted throughout with perfect good faith, and to the best of his ability, for the interests of the client.

Where property has been obtained by fraud, imposition, or undue influence, the person

from whom it was obtained, or his assignee, can recover it, not only from the original wrong doer, but also from all third parties who claim through him, and who may have had no share in the original tortious procurement of the property.

Action in the nature of *trover*, brought to recover a certain box and its contents, alleged to be six thousand, one hundred dollars in coin of the United States. Defendants put in a general denial. It appeared that the property in question had once belonged to one *Bien*, (who had been arrested on a criminal charge,) that he placed it in the hands of defendants, and subsequently transferred it by bill of sale to the plaintiff. The question presented to the jury was, whether the box and contents were given to defendants, (who were *Bien's* attorneys at his trial, wherein he was convicted,) for safe keeping, as was contended by plaintiff—or whether, as defendants claimed, the money was paid to them by *Bien* as their fee in defending him at his approaching trial. It appeared that a demand of the box and contents had been made on defendants before the sale thereof by *Bien* to plaintiff, and had been refused. The box, with the papers and documents, were, before the commencement of this action, given by defendants to *Bien's* attorney in fact.

Shafters, Park & Heydenfeldt, and *G. F. & W. H. Sharp*, for plaintiff.

Bennett & Stebbins, Thornton, Williams & Thornton, E. Casserly, and *Janes, Lake & Boyd*, for defendants.

D. Lake, argued for defense, that at the time of the pretended sale from *Bien* to the plaintiff, there had already been a demand for the box and contents, and for the return of the money — compliance with which had been refused; there was therefore nothing sold but a lawsuit—a *chose in action* arising in *tort*, and which is not assignable. *Gardner* v. *Adams*, 12 *Wend.*, 297; *Hall* v. *Robinson*, 2 *Comst.*, 293; *Thurman* v. *Wells*, 18 *Barb.*, 512. It being a conceded fact that the conversion, if any, took place before the transfer to the plaintiff, he cannot maintain this action.

J. McM. Shafter. The cases cited do not sustain the position. The case in 18 *Barb.* is essentially the assignment of a *chose in action*, which is not claimed in this case. The case in 12 *Wend.* has been

repeatedly overruled. *Robinson* v. *Weeks*, 1 *Code*, (*N. S.*) 311; 1 *E. D. Smith*, 522, *Brig Sarah Ann*, 2 *Sumner*, 511. In all contracts between attorney and client the strictest good faith should be invariably observed. The courts hold that the attorney is to take care of his client's interest in preference to his own, and will avoid contracts made by him in opposition to this rule. Contracts between those standing in this relation, one peculiarly of trust and confidence, are more readily opened than any other. 1 *Story Eq. Jur.*, § 511, note and authorities. In the case of *Newman* v. *Payne*, 2 *Ves. Jr.*, 199, here approved by judge *Story*, lord *Loughborough* declared *void* a bond given by a client to his attorney, and opened their accounts of many years standing. This decision is again referred to and approved by the whole court in *Starr* v. *Vanderheyden*, (9 *Johns.*, 253,) who say that "the court, from general principles of policy and equity, will always look into the dealings between attorney and client, and guard the latter from any undue consequences resulting from a situation in which he may be supposed to stand unequal."

If there be the least evidence of fraud, imposition, or undue influence, the whole contract is absolutely void. This doctrine is strongly declared by lord chief justice *Wilmot*, in *Bridgeman* v. *Green*, (*Wilm.* 58; 2 *Ves.* 627,) which case lord *Eldon* quotes as of governing authority in *Hugenin* v. *Baseley*, (14 *Ves. Jr.*, 273.) In *Whelan* v. *Whelan*, (3 *Cowen*, 537,) *Woodworth*, *J.*, in regard to this latter case says: (p. 576.) "I fully subscribe to the reasoning of sir *Francis Romilly* in *Hugenin* v. *Baseley*, (p. 287,) that 'if the court sees that any arts or stratagems, or any undue means have been used; if it sees the least speck of imposition at the bottom; if there be the least *scintilla* of fraud, this court will and ought to interpose.'" In this opinion chief justice *Savage* and nineteen senators concurred. But it may be said that if any fraud was perpetrated, it was by the defendant, *Zabriskie*, that *Cook* was not a party to it. But he shall not therefore retain the spoils. In the case of *Bridgeman* v. *Green*, just cited, lord chief justice *Wilmot* thus expresses himself: "There is no pretense that *Green's* brother or his wife was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money? No; whoever receives it takes it tainted and infected with

the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out among his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." This doctrine is not only concurred in by lord *Eldon* in *Hugenin* v. *Baseley*, but is there quoted and incorporated in his opinion, and in *Whelan* v. *Whelan*, *Woodworth*, *J.*, again cites it, together with the observation with which lord *Eldon* introduces it, that he "should regret that any doubt could be entertained whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition or undue influence of others." The cases in 5 *Johns. Ch.*, 44, and 11 *Paige*, 467, are also in point, and sustain our position. But further than this, the courts, in opposition to the ordinary maxim that "fraud shall not be presumed," have thrown upon the attorney the *onus* of proving that the contract was made fairly and in good faith, without any undue advantage being taken of the situation or condition of the client, and that it was the most advantageous one that could be made for him. He must advise the latter even against himself, and where it appears that his own interests have been promoted instead of those of the client, he is bound to show that the strictest good faith has been preserved. In *Newman* v. *Payne*, the bond given by the plaintiff to his attorney was not considered as even *prima facie* evidence of the existence of the indebtedness which it professed to secure, and the attorney was compelled to prove each item of the amount. In *Gibson* v. *Jeyes*, (6 *Ves. Jr.*, 266,) lord *Eldon* says that if confidence be shown, that circumstance throws upon the one in whom confidence is placed the whole *onus* of the case. In *Chesterfield* v. *Janssen*, lord *Hardwicke* in this regard says, that fraud is a matter of presumption to be rebutted by the other side. And in view of these cases, *Woodworth*, *J.*, in the case of *Whelan* v. *Whelan*, (3 *Cowen*, 576,) already referred to, recognizes their authority, and supports the same doctrine. "He who bargains in matter of advantage with one putting confidence in him, is bound to show that a reasonable use has been made of that confidence."

But if, again, the contract made between *Bien* and defendants was

of such a nature that their compensation was to be dependent upon the favorable result of the trial of the former, then also the contract was void. *Russell on Crimes*, (*Champerty.*) The § 494 of our *code*, does not extend to these cases. That section being under the head of "*costs*" in an act determining the civil practice, can only be regarded as extending to contracts made between the parties as to what amount of damages should be allowed the successful party to the action as attorney's fees — a case analogous to the provision frequently contained in mortgages, allowing a certain amount to the mortgagee as attorney's fees for conducting the foreclosure thereof.

H. I. Thornton, for defendants, in reply.

I think that the first ground taken by the opposing counsel is not tenable. If, at the time of the sale from *Bien* to plaintiff, defendants were in possession of the property, and claimed the title and ownership thereto, adversely to *Bien*, then the latter could not make a valid sale to plaintiff. Property in the adverse hostile possession of another is not the subject of sale.

In *Young* v. *Ferguson*, (1 *Littell*, 298,) the court say, in speaking of the facts of that case, which are precisely similar to that at bar so far as this point is involved, "The merits of *Ferguson's* purchase, it is true, do not appear, but his adverse claim does; and the principle is, that the plaintiff below cannot try these merits in his own name, because the claim and possession of *Ferguson* were adverse, at the date of the sale to *Young*, which precluded him from taking the legal title, so as to enable him to question the same merits." A man can only *sell* his *property*—that which belongs to him. As to what is *property*, the common law is clear. All the decedent's *personal property* vests, by that law, in his executors and administrators; but to enable one filling this trust to maintain an action which was founded on any malfeasance, or a *tort*, or arose *ex delicto*, such as trespass for taking goods, &c., trover, escape, and many other cases of the like kind, where the declaration imputes a *tort*, done either to the person or the property of the decedent, required the passage of the statute, *de bonis asportatis in vita testatoris;* thus showing that by the common law, all this class of claims and demands was not, nor is it now, personal property. (See *Williams on Executors*, 511.)

Bien, at the time of his sale to *McKinnon*, had nothing but a *claim*,

a demand or right of action arising in *tort*, as appears from the averments of the complaint on their face. He had not even a *chose in action*, strictly speaking, to transfer. A *chose in action* is such property as, if it had not been assigned, could have been seized by a creditor. What is there here that could have been seized by a creditor? Will it be pretended that one could have attached and have successfully prosecuted in his own name this right of action? But again, a *chose in action* is such property as could be set off to a counter claim. What set off could there be to the right to recover damages for a *tort*, such as exists in this case?

With regard to this right of the assignee to maintain an action in his own name for property held by a person adversely to his assignor, at the time of the assignment, we have a case in point which directly reviews the case to which we have been referred, decided by judge *Story*, in 2 *Sumner*, 206. In *Goodwyn* v. *Lloyd*, (8 *Porter*, 237,) *Ormond*, *J.*, in delivering the opinion of the court, says: (p. 242.) "It is manifest that the plaintiff in error not only held the slaves adversely to *Harwood Goodwyn*, but also that he *held under color of title*," (which defendants do here; they claimed the contents of the box by purchase, adversely to *Bien.*) * * * "Such being the position of the parties, it is clear that the right of action could not be transferred by a sale of the slaves. The absence of all authority is persuasive to show what the law is. * * * In the case of *Stedman* v. *Riddich*, (4 *Hawke.*, 29,) this point was expressly determined. Chief justice *Taylor* says: 'But I know of no authority for the position, that a vendee or assignee may sue for property in his own name which the vendor or assignor, at the time of the sale, could only recover by suit.' * * * So also in the case of *Stogdale* v. *Fergate*, (2 *Marshall*, 136,) the chief justice, giving the opinion of the court, expresses himself thus: * * 'If the plaintiff was not in possession of the hogs at the time of the sale, the right of action could not have been thereby transferred to his vendee, and that he was not in possession is evident.' These cases are conclusive on the point involved in this case."

And then the learned judge goes on to review the opinion of judge *Story* in the case of the brig *Sarah Ann*, (2 *Sumner*, 206.) After stating that the remark in which that judge denies the correctness of the principle for which we contend, "was merely stated by

him as an illustration," judge *Ormond* says: "Although the principle above stated might aid in the solution of that question, and be thus brought in aid of the argument, it was certainly a point not necessary to be determined in the decision of the cause, and therefore not entitled to the weight of an adjudged case. And again, the judge merely states that the effect of a sale under the circumstances supposed, would be to vest the title in the purchaser; how the right thus acquired could be enforced, is not stated, nor whether it could be enforced by the transferee in a court of law—which is the sole question before the court. * * * Even if, in our opinion, the law was of questionable propriety, we should hesitate long before we would undertake the abrogation of a principle coeval with the very foundations of the common law."

In the case of *Brown* v. *Lipscomb*, (9 *Porter*, 472,) the authority of *Goodwyn* v. *Lloyd* is recognized, and the same doctrine advanced. *Goldthwaite, J.*, delivers the opinion of the court, and says: (p. 477.) "The case therefore presents a different state of facts from that of *Goodwyn* v. *Lloyd*, (8 *Porter*, 237,) in which this court decided that possession taken and held, under color of title, was sufficient to render a subsequent sale by the person having title, inoperative and void. It is clear that the possession of the slave was not with the trustee; it is also clear, that no right of possession was claimed through him, but the slave was held adversely, and in spite of him. It cannot be denied, we think, by any one, that he had nothing but a right of action, if the taking was not a larceny, as there was a denial, and disclaimer of all right in the trustee." The *bona fides* of the *claim* of the adverse party is always a question of fact for a jury, as is also the *fact* of the adverse hostile possession. *Brown* v. *Lipscomb*, 9 *Porter*, 472; *Jackson* v. *Jay*, 9 *Johns.*, 102; *Clapp* v. *Bromaghem*, 9 *Cowen*, 530. In the latter case a new trial was awarded on the ground that the court below at the trial instructed the jury that the possession of the defendant was not adverse and hostile to that of plaintiff.

By § 434 of our *Practice Act*, alluded to by the opposing counsel, defendants and *Bien* are authorized to make any contract they may think fit, and even though the jury should think it unconscionable, it is not their province, nor in their power, to modify or annul it. The

section referred to is positive and broad in its provisions, and does not admit the forced construction which *Mr. Shafter* has claimed for it. With regard to the relations existing between these parties, and its influence upon the contract made by them, I shall cite but one authority, *Rust* v. *Larue*, (4 *Littell*, 411,) wherein *Mills*, *J.*, delivers the opinion of the court and in the course thereof says: "It is further urged on the part of the appellant that the fee is enormous and unconscientious, and therefore ought not to be enforced by the chancellor. To this we answer, that the prospect of success was very doubtful, and so proved in the end. It is finally contended that the contract was made by those who stood in the relation of counsel and client, and that one made in such an attitude of confidence cannot be supported. It is true such contracts are received with a very jealous eye by the chancellor, and many such have been set aside, and counsel compelled to accept a reasonable compensation for their services. Most of the cases, however, which exist of this nature will be found to be concerning contracts made after counsel was engaged and before the termination of the suit. The question then is, can the contract made at the first employment be subject to the same rule? We perceive no good reason why it should be. At that time counsel cannot be supposed to have acquired such an ascendency over the client as to inveigle him into a contract dangerous to his interests."

It may be contended that *Bien* was not in a condition to contract. But the evidence shows that *Bien*, even had this been the case, did after that confirm it. Chief justice *Edwards*, in *Taylor* v. *Patrick*, (1 *Bibb.*, 168,) says, under circumstances much more strong than any that can be here contended for: "It is not believed by the court that any particular form of proceeding is necessary to operate as a confirmation; it appears to us to be fully sufficient if any act is done which clearly indicates the assent of the mind to stand by and perform the contract which had been previously entered into." And certainly this assent can be as conclusively shown by the failure to object, as it can by some act of express confirmation.

One of the instructions given at the request of plaintiff was: "If the jury find that the relation of attorney and client existed between *Bien* and defendants, then it is incumbent upon the latter to show that there was no fraud, imposition or undue influence employed."

NORTON, J., charged the jury. There have been some questions raised and argued to the court during the trial of this cause with respect to plaintiff's right to recover, the admissibility of evidence, &c., with all of which you have no immediate connection. With regard to these, parties have the benefit of their exceptions in case any of the rulings of the court upon these points should, upon more careful and extended consideration by this court or by a higher tribunal, be deemed erroneous.

In this case, from the very nature of the questions which have been raised, and the peculiarly legal character of the points presented, your duty is necessarily very restricted. The action is brought in the form called *trover*, to recover certain specific personal property, or its value. If you find for the plaintiff, you will merely find generally the amount which the testimony has shown to be the value of the property claimed. It appears that it once belonged to *Bien*—that he by a bill of sale transferred it to *McKinnon*—that the latter demanded it of defendants, *Cook* and *Zabriskie*, and that upon this demand, they refused to deliver it to him. If you consider that the proof shows this, and that *Cook* and *Zabriskie* had it in their power and under their control at the time of the demand, then plaintiff has made out a *prima facie* case. Plaintiff has contended, as matter of law, that although *Bien* at the time of this transfer by him, had not the possession of the box in question, or of its contents, and although defendants claimed to hold it adversely to *Bien*, and claimed to be the owners of it, yet that does not affect his right to recover. Upon this point I will charge you that if, at the time of the sale to plaintiff, *Bien* had the title to the box and the *whole* of its contents, the fact that the defendants had the possession and claimed it as their own, will not bar a recovery.

Plaintiff having thus, as I stated, made out a *prima facie* case, defendants then justify their refusal to surrender the money, by alleging that it had, before the sale to plaintiff, become theirs by *purchase*—that is, they claim that it had previously been transferred to them as a compensation for professional services—as a retaining fee. If you find from the evidence that the title to *any portion* of this property had passed to defendants by transfer from *Bien*, before the sale of the whole of it, by him to plaintiffs, then the latter cannot

recover, because the action is for one specific thing, to wit, a box and its contents, and the plaintiff cannot recover something else which he has not claimed.

Plaintiff relies upon *Bien's* testimony to show that, as matter of fact, there never did exist any valid contract by which *Bien* parted with the title to any portion of the contents of the box to defendants—and to show that it was merely deposited with them for safe-keeping. This is the most important of the different questions which have been raised, which properly come before you, and not the court, for consideration and final disposition—whether *Bien*, by any valid contract made with defendants, ever divested himself of the title to any portion of this property, and conveyed the same to defendants. If you find, from all the testimony, that this was actually the case, then defendants are entitled to your verdict. If you are satisfied from the evidence that the order for the box, given by *Bien* to *Cook* and *Zabriskie*, was not given for the purpose of enabling them to obtain possession of it as a deposit and for *Bien's* benefit—but that the intention of the parties at the time was, that they should be thereby enabled to take out their fee—although the remainder was to have been retained in possession by them, as bailees—then also you should find for defendants. This is the question, and the only question submitted to you: was there a contract—and a fair and valid contract—made between *Bien* and defendants previous to thetransfer by t he former to plaintiff, by which it was agreed that they were to take their fee from the box and money placed in their hands. If you find affirmatively upon this issue, you must find for the defendants.

In determining this point you can consider the magnitude of the fee by defendants alleged to have been contracted for, but under one point of view only—that is, as a circumstance tending to show whether or not such a contract ever did, as a matter of fact, actually exist. This is not a case where you can take into consideration the magnitude of the fee claimed, as being unconscionable, or that the contract was one to be relieved against, or as a case in which you have a right to declare that the fee is unreasonable, and to diminish or regulate it according to what may be your opinions of a just and reasonable fee under the circumstances. That question does not arise in the case. The plaintiff must recover everything or nothing; you cannot give

them a partial verdict and deduct what you think defendants ought in right to receive as compensation for the services which it has been proven that they did actually render. You must only take the magnitude of this fee claimed as a circumstance or *indicium* tending to show the existence of a contract.

But this contract, whatever may have been its terms, must have been a fair one, and if you find that when it was made, there was any undue advantage taken of *Bien's* condition, or that any undue influence, imposition, or fraud was practised upon him, or that he was at the time laboring under such a state of excitement as would disable him from a due and proper use of his reasoning faculties,—then in any and every such case, any contract which might have been made with him, however just and reasonable it may have been, would be absolutely void, and although it should have been of the character which I have heretofore mentioned, that is that defendants were to take their fee from the box and money placed in their hands,—such a contract, made under such circumstances, would not divest *Bien* of the title to any portion of that property and transfer it to defendants, or bar plaintiff's right to recover. If you should be satisfied that a contract was made, that *Bien's* mental condition was not such as to disable him from entering into a valid and binding contract, that no fraud imposition or undue influence was exercised or employed, then you have no power to set such a contract so made aside on any grounds whatever. Under our statute those standing in the relation of attorney and client are at liberty to make any contract they may see fit, but this neither abrogates nor alters the common law rule of the necessity for the observance of perfect good faith on the part of him who stands in the peculiarly confidential relation of counsel,—and under our system, as well as under the common law, the employment of any threats or misrepresentations, or fraud by the attorney, to prevent or influence the free exercise of the client's judgment, would avoid any contract however reasonable, that might have been made.

You are at liberty to find against one and in favor of the other defendant, and if so, you will express the same by your verdict. If you should find that *Cook* did not personally make any contract with *Bien*, —that it was made by *Zabriskie* on behalf of himself and *Cook*, but that *Zabriskie* employed any of the unfair means to which I have

referred,—the fact that *Cook* had no hand in the matter, is no reason why he should retain the money, obtained in pursuance of such a contract, and will not bar a recovery against him. But, however your verdict may be as to the persons of the defendants, it must be for the entire box and contents, and unless these were originally deposited by *Bien* in the hands of defendants as bailees, your verdict must be in their favor. The declarations of *Zabriskie* which have been proven to you, with regard to the nature and terms of this contract, are not evidence against *Cook*, unless there was but one common contract made by both *Cook* and *Zabriskie* with *Bien*,—but if on the contrary you should be satisfied that each of the defendants made his separate contract with *Bien*, then *Zabriskie's* declarations are evidence only against himself.

If you should find for plaintiff, and should conclude that defendants came jointly into possession of the property, and that, at the time of the demand by *McKinnon*, it was under their joint control, you will find against both.

The jury found generally for the defendants.

BANKS vs. BANKS.

Twelfth District Court for San Francisco Co., Nov. T., 1857.

DIVORCE—ALIMONY.

Where a wife leaves her husband and institutes proceedings for a divoree, he will be compelled to furnish her with alimony, provided the allegations of the bill and the admissions of the answer make out a *prima facie* case for plaintiff. *Aliter*, if not.

This rule will not be relaxed, though the answer may contain facts which, if proven, would work a justification of the wrongs alleged in the complaint.

The material facts are stated in the opinion.

B. S. Brooks, for plaintiff.

Holladay & Cary, for defendant.

NORTON, J.—This is an application for an allowance of temporary alimony to the wife, the plaintiff, which has been strenuously resisted

by the defendant. It appears that while she was living with her husband he furnished her amply with food and clothing, &c., and avers a willingness to do so again, provided that she will return, but declines unless she shall so do. From these facts his counsel conclude that she ought not to have left him, and that, having thus left him without sufficient cause, he should not be compelled to furnish her with support, unless she return. He has cited authorities to sustain this position, but I think that he has mistaken the principle upon which they rest. The case from 3 *Paige*, 267, was one in which the wife left her husband because he would not allow her to attend a particular church, and which, although an unreasonable exercise of his marital power, does not present a *primâ facie* case for allowing a divorce. But in this instance the plaintiff not only alleges facts sufficient to make out a *primâ facie* case, but there is abundance admitted in the answer to present it in that character. The difficulty seems chiefly to have arisen on account of a deaf and dumb boy of plaintiff's, whom defendant once whipped, and whom he at a subsequent time turned out of doors. He admits the fact of whipping, but alleges, in justification, that he had caught the boy stealing money, and that the act complained of was a punishment; he also admits that he turned the boy out of doors, but alleges it was because he was disobedient. The wife also avers that defendant has treated her badly—has struck her, and locked her up when she remonstrated against her deaf and dumb boy being turned out of the house. This is also admitted, but it is alleged that the striking was in self-defence, she having first assaulted him. Although the facts set up in the answer would, perhaps, if proven, work a justification, yet those which are admitted are sufficient to make out a *primâ facie* case, and therefore remove the case from the operation of the principle upon which the former adjudications cited by the counsel were founded. The referee, to whom the question of alimony was referred, reported that a suitable allowance was $50 per month to the wife for temporary alimony, and $150 a reasonable counsel fee. This latter I reduced to $100 upon the representation of the counsel opposing, that there would be very little contest in the case—a representation not very well borne out by the subsequent facts. Plaintiff's motion must be granted, and it is ordered that the defendant pay to plaintiff the sum of $50 for immediate alimony.

BUCKINGHAM vs. WATERS.

Twelfth District Court for San Francisco Co., Nov. T., 1857.

DEMURRER—GOOD WILL—COVENANT.

The good will of a particular person or firm, with respect to their patronage to any particular business, is not, it seems, the subject of sale.

Where one sells the *good will* in the matter of drayage of a firm to another, "to have and to hold, &c.," these words do not amount to a contract on the part of the vendor, that he will never afterwards do drayage for that firm.

On demurrer. The material facts are reported in the opinion.

C. Burbank, for plaintiff.

J. T. Treadwell, for defendant.

NORTON, J.—This case comes up on demurrer to the amended complaint. In the original complaint plaintiff alleged that in November, A. D. 1854, defendant sold plaintiff three horses, three drays, three sets of harness, and the "good will of the house of *Messrs. Loud & Hosmer*," in the business of drayage for the said house, as at the time of the sale, by them extended to defendant, and agreed that he would recommend plaintiff to said house to enable him to obtain and secure the business of drayage of said house. At the end of the bill of sale is appended the ordinary *habendum* commonly annexed to deeds of land. This provision, plaintiff goes on to aver, meaning that he (defendant) "would refrain from doing the business of said house forever" is the matter of drayage. The plaintiff then charges that regardless of this agreement, defendant has managed to get back the business of said mercantile house, to the damage of plaintiff, &c.

A demurrer was interposed to this complaint on account of certain technical defects, and sustained with leave to amend, which was done, and a demurrer is now filed to the amended complaint. There being no matter of form demurred to, the merits of the case are presented by the points raised by defendant. The principal of these is that the alleged intendment of the instrument as averred in the complaint, is not its legal intendment; that is, defendant contends that the *habendum*

is not a covenant that defendant shall never again enter into the business of drayage for the house of *Loud & Hosmer*. I think that in this, defendant is right. The *habendum* in a deed of land does not mean that the grantor shall never thereafter become the possessor of the land. By analogy it would seem that the same construction, as far as is consistent with the nature of the case, should be applied to those words in their present connection; if we do so construe them, then there has been no breach of contract committed by defendant and plaintiff cannot maintain this action.

But, as I expressed in my opinion sustaining the demurrer to the original complaint, I do not think that the good will of certain specified persons is the subject of sale. None of the cases which have been cited by plaintiff's counsel in this regard, present the precise point here raised. They are generally cases where some establishment or place of business, as an inn or newspaper, has been sold, together with the good will of the public, that is, the patronage which, under the control and management of the vendor has been by the public extended to the concern. Sales of good will of this character have been often recognized, and the law respecting them is well settled, but no case has been adduced which possesses the particular and peculiar character of that at bar. It is not the good will or general partronage of the public which the bill of sale purported to convey to plaintiff, but it is the good will of certain determinate persons, the members of a mercantile firm.

There is a third point of minor consequence which also presents itself from the language of the bill of sale, by which defendant transfers the good will of *Messrs. Loud & Hosmer* as *then*, (at the time of the sale,) extended to defendant. Perhaps, strictly speaking, even if we give the bill of sale the widest construction, and hold that defendant could sell the good will of *Loud & Hosmer*, it might be doubted whether, strictly speaking, the good will which defendant afterwards obtained, was that which he sold. But this question is immaterial, for either of the other grounds are sufficient for the purpose of sustaining the demurrer.

ROGERS, PUBLIC ADM. VS. HOBERLIEN.

Twelfth District Court for San Francisco Co., Nov. T., 1857.

PUBLIC ADMINISTRATOR—HIS SUCCESSOR IN OFFICE.

A public administrator receives letters of administration by right of his office, and not on account of any connection with the particular estate; and all his powers and duties end with his term of office, and devolve to his successor in office.

His successor in office being thus the assignee of leases made by the predecessor, may bring an action in his own name to collect the rent.

This action was brought to recover the sum of $1500, for rent of premises leased to defendant by *Samuel Flower*, late public administrator, and administrator of the estate of *Augustus Deck*, deceased. The premises were the property of *Deck*, and in the discharge of his trust, said *Flower* leased them to *Hoberlien*.

D. Rogers, for plaintiff.

Shafters, Park & Heydenfeldt, for defendant.

NORTON, J.—This case is submitted on an agreed statement "upon the single point that the plaintiff has no right to maintain this action because he is not in any respect the administrator of *Augustus Deck*."

It is agreed that the probate court made an order in January, 1855, "that letters of administration issue to *Samuel Flower*, public administrator;" that the present plaintiff is his successor in the office of public administrator, and to whom he handed over all the papers he had as administrator of the estate, and I suppose it is intended to be admitted, and perhaps the defendant is estopped from denying, that the lease in question was executed by *Flower* as such administrator.

The question is, whether a public administrator, appointed to administer an estate, holds the trust like any other administrator until specially removed or the estate fully administered, or whether he holds as a public officer whose functions cease upon the qualification of his successor in office. The obscurity of the statutory provisions upon the subject has doubtless arisen from the piece-meal mode in which they have been enacted. By chapter 14 of the law of 1850, relative

to the estates of deceased persons, the probate court was authorized to appoint a public administrator, and his powers and duties were clearly defined, and by which it appears he was not to be an administrator proper of particular estates, but was merely to be a public officer whose duties were to preserve the property of deceased persons until a regular administrator should be appointed. He was not named in section 52 as a person authorized to receive letters. Under the law there would seem to be no doubt that his powers and duties would cease with the expiration of his term of office. The next year, March 8th, 1851, a special law for the county of San Francisco was passed, making the public administrator for that county elective. It is well known that this law was passed for the special purpose of ousting the person who then held the office by appointment of the probate judge. The law is brief and imperfect, providing for scarce anything except an election the next month, and that the "present" incumbent should hand over everything to his successor. Soon after (April 15, 1851,) this law was abrogated by a general law for all the counties of the State, but this appears to have been copied from the special law for San Francisco county, and has the same defect in this respect—that is, it only provides that the "present" incumbents shall transfer the property in their hands to their successors. This limitation to "present" incumbents must have been an inadvertence. The abstract in the margin indicates the understanding of those engaged in the publication of the law. No special duties of the officer are prescribed by this act, but by section three he is required to perform such duties as may be prescribed by law. At this time such duties were distinctly prescribed by section 310, chapter 14, of the act of 1850, relative to the estates of deceased persons, and the public administrator was not authorized as such to receive letters of administration. Soon after this (May 1, 1851,) the law of 1850, relative to the estates of deceased persons, was repealed, and another passed in its stead. In this law, the provisions of section 310 of the former law, prescribing the duties of public administrator, are omitted, and, on the other hand, he is named as one who is authorized to receive letters of administration upon particular estates. The plaintiff's counsel claims that *Flower* did not hold this estate by virtue of his appointment as administrator of this particular

estate, but by virtue of his office of public administrator, and apparently bases this upon the remarks made by justice BURNETT in the case of *Becket* v. *Selover*, 7 *Cal.*, January term, as to the meaning of section 305 of the act of 1851, relative to the estates of deceased persons. Had the judge's attention been directed to the circumstance that the powers which he considers conferred by section 305 were specially conferred in the act of 1850, by a section immediately preceding the one now numbered 305, and the omission of that section in the act of 1851, he might have considered that section 305, and some other sections of chapter 14 of the present act, have no intelligible meaning, and that they have been only left there by the effect of bad legislative joinery, and that at present public administrators have no powers until they receive letters, except such as may be conferred under section 88, and perhaps some similar sections. However this may be, there can be no doubt under the facts of this case that *Flower* took the lease in question in his character of administrator of the estate of *Deck*, under his special appointment. But does it follow that his powers as such continued after the expiration of his office of public administrator? If we are not at liberty to consider the word "present," in section six of the act of 1851, relative to public administrators, as a surplus word inadvertently copied so as to apply that section to this case, at least that section indicates the legislative understanding that there is no intrinsic objection to such a change of administration, and may serve to answer the argument, founded upon the inconvenience of such a change, and the improbability of its being intended by law. On the other hand, the public administrator receives letters, by right of his office, and not on account of any connection with the particular estate; his bond is not yet given, nor oath taken, in each case, but only upon entering upon his public office, and in the absence of any provisions of law relative to his office, different from those applicable to all public officers, it would seem that all his powers and duties ended with his term of office, and devolved upon his successor in office. If he be properly the administrator of each particular estate, he obtains the trust by a law applicable to him as public officer, and there seems to be no reason why his letters, and the assets he holds under them, may not pass to his successor in office as effectually by operation of law, as to have his

letters especially revoked, and new ones issued by an order of the probate court. His successor being thus the assignee of the lease, may bring the action in his own name to collect the rent.

In this case judgment must be entered for the plaintiff.

SYER vs. GWIN.

Twelfth District Court, for San Francisco Co., Nov. T., 1857.

CONTRACT—SLAVES—WAGES.

In the absence of any special facts arising from peculiar relations of the parties, or other circumstances, when valuable services are rendered and received, a jury would be authorized to *infer* a contract to pay.

Whether the law would absolutely imply such a contract, *quaere?*

A. brought slaves to a free state who continued to reside with him and did not demand wages. *Held*, that on these facts the inference was that the services were rendered without any understanding or expectation by either party that wages were to be paid, and under such circumstances the law does not imply an obligation to pay.

The court has passed upon all the facts in the opinion.

McCabe, for plaintiff:

First. Defendant and wife were manumitted by operation of law by being brought into this state voluntarily by the defendant. *Commonwealth* v. *Aves*, 18 *Pick.* 193; *Lee* v. *Lee*, 8 *Peters* 44; *Pregg* v. *Commonwealth*, 16 *Peters* 539; *Wenny* v. *Whiteside*, 1 *Missouri* 427; *Willie* v. *Smith*, 2 *Missouri* 36; *LeGrange* v. *Choteau*, 2 *Missouri* 20; *Inlix* v. *McKinney*, 3 *Missouri* 3; *Natt* v. *Ruddie*, 3 *Missouri* 400; *Ex parte Simmons*, 4 *Wash.* 396; *Respublica* v. *Blackmore*, 2 *Yeates* 234; *John* v. *Durnam*, 2 *Yeates* 449; *Jackson* v. *Mullock*, 12 *Cowen* 38; *Rankin* v. *Lydia*, 2 *A. R. Wash.* 467; *James Somersett's case*, 1 *Blackstone* (*Chitty*) 425, *n.* 3.

Second. Plaintiff is entitled to recover wages of himself and wife from the moment they became free. *Thompson* v. *Wilmot*, 1 *Bibb* (*Kentucky*) 422; *Reuben* v. *Parish*, 6 *Humphrey* 122; *Lewis* v. *Simonton*, 8 *Humphrey* 185; *Phillis* v. *Grutin*, 9 *Louis.* 208; *Matilda* v. *Crushaw*, 4 *Yerger*, 299.

Third. It is said that this case is analogous to that of a person who continues to work for his father after majority. *Freto* v. *Brown*, 4 *Mass.* 675; *Angel* v. *McLellan*, 16 *Mass.* 31 and n. 9; *Jacobson* v. *Ex'rs of Le Grange*, 3 *Johns*, 379; *Le Sage* v. *Cressmaker*, 1 *Esp.* 189.

Fourth. In regard to the point that we have alleged no promise—inasmuch as the law implies it, there is no necessity for our so doing. 1 *Whittaker's Pr.* 380, 1, 2, 3, 404, 5; *Glenny* v. *Hitchkins*, 4 *How. Pr.* 98; *Gawey* v. *Fowler*, 4 *Saudf.* 665.

Fifth. If *A.* take the goods of *B.* and convert them, he is liable. *Comyn on Cont.* (*4th Am. from last Lond. Ed.*) 7; *Hill* v. *Davis*, 3 *N. Hamp.* 387. And by analogy the doctrine is applicable to the acceptance and appropriation of personal services.

Sixth. Had plaintiffs been white servants the law would have implied the promise. *Jackson* v. *Ex'rs of Le Grange*, 3 *Johns.* 200; *Comyn on Cont.* 4. Their being black, shall they not have the same rights?

Saunders & Hepburn, for defendant:

The plaintiff, in order to recover, must make out a contract. It is admitted that there was no express contract,—he must then show an implied one. By a reference to the authorities it will be found that it is incumbent on the plaintiff to show *affirmatively* and by distinct proof that payment was contemplated. *Alfred* v. *Fitzjames*, 3 *Esp.* 3; *Condor's case*, 5 *Watts & Searg*, 513; *Fitch* v. *Peckham*, 16 *Vern.* 156; *Andrews* v. *Foster*, 17 *Vern.* 556; *Win* v. *Win*, 3 *B. Monroe*, 647. The four last cases are of the class of children working for their parents after growing of age. In *Condor's case*, there was a good deal of proof to show an understanding that the service was to be paid for. To the same effect, is *Arbuckle* v. *Barney*, 5 *Louis.* 700; *Eugenie* v. *Preval*, 2 *Louis.* 180, 620–1.

NORTON, J.—This action is brought to recover compensation for services rendered by the plaintiff and his wife as servants of the defendant.

The facts agreed upon are: that the plaintiff and his wife were the

slaves of the defendant in the state of Mississippi, and were brought by him to this state as such, and that they continued to live in his house here and rendered services as servants, the plaintiff for about eight months and his wife for about two years and eight months; that the defendant furnished the plaintiff and his wife with shelter and board, and that the defendant never made with the plaintiff or his wife any express contract or promise to pay wages for said services; and that the services of the plaintiff were worth $50 per month, and those of his wife $55 per month, provided the court shall be of opinion that the plaintiff is entitled to recover.

The complaint omits many averments which are usually made in actions of this nature. It does not aver any contract of hiring nor any promise to pay, or that the services were rendered upon request, or upon any understanding or expectation by either party that wages were to be paid. The question is, whether the law on these facts implies a promise or an obligation to pay wages.

The simple fact that one person renders and another receives valuable services, does not always create an obligation to pay for them. They may be gratuitous, or rendered in consideration of love and affection, or in the hope of receiving some favor, such as a legacy. In the absence of any special facts arising from peculiar relations of the parties, or other circumstances, where valuable services are rendered and received, a jury would be authorized to infer, and perhaps the law would absolutely imply, a contract to pay. But where such peculiar relations or other circumstances exist, a jury is authorized to infer the contrary, and the law does not always imply a promise or obligation to pay. If children continued, after arriving at their majority, to reside with, and render services to their parents, they are not absolutely entitled to recover wages, but will or will not be thus entitled, according as the circumstances of each case authorize the inference that the parties did or did not contemplate the payment of wages.

Upon these slaves being brought into this state they became immediately entitled to make a contract with their former master, as to the terms upon which they would serve him, or to seek service with other employers. Instead of this they continued to live with him voluntarily, as they had formerly done. During a period of two and a half years,

as to one, and eight months as to the other, they received their sustenance, and made no claim, so far as appears, for wages. If they and their former master should hereafter reside in the state of Mississippi, their former relation will revive with its reciprocal obligations on their part to render service, and on his to furnish support as well during the time those services are rendered, as after age or infirmity has rendered them incapable of rendering valuable services. From these facts, the only reasonable inference to be drawn, is, that these services are rendered without any understanding or expectation by either party, that wages were to be paid; and under such circumstances the law does not imply an obligation to pay.

This exact point was decided in the same way in the case of *Alfred* v. *Fitzjames*, (3 *Esp.* 3,) and that case was cited as an authority for deciding the same way the case of *Livingston* v. *Ackeston* (5 *Cowen*, 531). There are many cases in the slaveholding states, where parties have been compelled to pay for the services of colored persons held as slaves, who were in fact, free; but these are cases in which the services were rendered involuntarily, and were obtained by fraud or force.

There must be a judgment for the defendant.

Ex parte WOOD.

Sixth District Court for Sacramento Co., Dec. T., 1857.

JUDGMENT AND SENTENCE IN CRIMINAL PROSECUTIONS.

The judgment pronounced in a criminal prosecution must be definite and precise,—and a judgment that the prisoner "be imprisoned two hundred and sixty days in the county prison *or* pay a fine of five hundred dollars and twenty dollars cost," is a nullity.

A warrant issued in pursuance of such a judgment commanding an officer to "arrest the said defendant and imprison him two hundred and sixty days in the county prison unless said fine and costs be sooner paid," is insufficient on *habeas corpus*, inasmuch as it is not "authorized by any *judgment* of any court."

It is questionable whether any legal sentence can be pronounced upon a defendant who is absent, though counsel may at the time have waived the objection.

After a prisoner has been discharged on *habeas corpus* by reason of an unauthorized commitment, it is a question whether he can be brought before the tribunal which pronounced the judgment and again sentenced.

Hardy and *Wallace*, for applicant.

R. F. Morrison, district attorney.

BOTTS, J.—It appears by the return of the officer that the prisoner is held upon what, in language original and I believe peculiar to the recorder's court, is called a "*capias pro fine.*" This warrant recites the fact that the prisoner was convicted in the recorder's court of the city of Sacramento, on the 12th day of December, 1857, of the crime of assault and battery, and was thereupon adjudged by said court "to be imprisoned two hundred and sixty days in the county prison, or pay a fine of $500 and $20 costs," wherefore the officer is commanded to "arrest the said *Wood* and imprison him two hundred and sixty days in the county prison, unless said fine and costs be sooner paid." This warrant is dated Dec. 14th, 1857.

The question for the court to decide is, whether the prisoner is legally held under this process. The *habeas corpus* act provides that the defendant shall be discharged "when the process by which he is held is not authorized by any judgment, order or decree, of any court, nor by any provision of law." Upon this provision two questions arise: has any judgment been pronounced upon the conviction of the prisoner? and if any, is it one that authorizes this process? However erroneous the judgment may be, it cannot be reviewed and corrected upon *habeas corpus*. To correct errors is the province of the appellate court. The prisoner, in this application, must rest his case upon the entire nullity of the supposed judgment, or upon its insufficiency to warrant the process under which he is held. I am inclined to think that no judgment has been pronounced upon him. It is of the very essence of a judgment that it should be definite, precise and certain. The statute punishes assault and battery with fine or imprisonment, at the discretion of the court. In rendering judgment, that discretion must be exercised, and the judgment is the announcement of the result. Here it appears that the recorder has never determined whether the convict should be punished by fine or imprisonment. The judgment must not only determine this point, but must fix the amount of the one or the duration of the other. This judgment is certainly no

more definite than it would have been had it declared generally that the prisoner should be fined or that he should be imprisoned. The law of attachment requires the attaching creditor to make oath that the debt arose on contract express or implied. An affidavit, in the words of the statute, that the contract was express or implied, has been held insufficient, as too indefinite and uncertain. Surely as much precision is required in a judgment in a criminal case as is demanded in an affidavit in a civil action.

It is true that the statute provides that "a judgment that a defendant pay a fine, may also direct that he be imprisoned until the fine be paid or satisfied;" but this is clearly not such a judgment, although from the "*capias pro fine*" which was issued upon it, we are led to suppose that it was so intended. Indeed, the learned district attorney, who appeared to sustain the legality of the imprisonment, contends that it is a judgment of imprisonment for two hundred and sixty days, and that everything in relation to the fine is mere surplusage. It is upon this ground only, that he sustains the legality of the detention of the defendant. He denies that the payment of the fine would entitle the prisoner to his release, although he admits such to have been the uniform practice of the recorder's court. If he be correct in this position, it follows that this process—I mean the "*capias pro fine*"—under which the prisoner is held, is not authorized by the judgment.

It is suggested that this is a very common form of judgment in the recorder's court, and that the same construction that would discharge the prisoner might operate as a general jail delivery of public offenders. If it be so, it is a consequence much to be regretted, but it would be a still greater public evil if any fear of consequence should deter a minister of justice from declaring and enforcing the law of the land.

Further: it appears that, in this case, the defendant was not present when the judgment was pronounced. The statute authorises the finding of a verdict, in certain cases, in the absence of the defendant, but it clearly contemplates that the defendant shall be present when judgment is pronounced, and to this end provides for the suspension of sentence until the defendant, if out on bail, may be brought in by legal process. It may admit of grave doubts whether any legal sentence can be pronounced in his absence. If the presence of the con-

vict be necessary to authorize the judgment, the consent of counsel cannot dispense with the necessity.

It may be possible that it is not yet too late to bring the defendant before the recorder, that judgment may be rendered against him. I take the liberty of making this suggestion, because, both as a citizen and an officer of the law, I am loath to see a public offender escape the penalty of his offence.

No judgment has been pronounced against the defendant that authorizes the process under which he is held. Let him be discharged.

CONROY v. WOODS.*

Twelfth District Court, for San Francisco Co., Sept. T., 1857.

PARTNERSHIP PROPERTY.

A. B. and C., being partners, the two latter sold their interest to *D.*, *subject to the partnership debts*. *D.* subsequently sold to *A.* The individual creditors of *A.* attached the property, and afterwards the partnership creditors attached the same, obtained judgment and issued execution, enjoining the proceeds of the sale in the hands of the sheriff. They then filed a bill of intervention. *Held*, that in the hands of *A.* the property remained subject to the payment of the partnership debts, and to the liens acquired by the partnership creditors.

It seems that *A.* is in the nature of a *quasi* trustee of the partnership property as to the shares of *B.* and *C.*, for the partnership creditors.

A distribution of the proceeds of the property attached may be decreed without a general account of the copartnership affairs being first taken.

The material facts are referred to in the opinion.

C. V. Grey and *J. Simpson*, for plaintiff.

G. F. & W. H. Sharp, for defendants.

Joseph Simpson, for plaintiff, argued,

First. The sale from *Brooks* and *Moore* to *Bell*, dissolved the partnership, but left the property as before, subject to the partnership

*1 Cal. D. C., 190.

debts. The purchaser received only the interest of the vendors in the surplus after the partnership accounts should have been settled; and as *Bonney* had a lien upon the assets for the purpose of their application to the partnership debts, *Bell* could do nothing inconsistent with the primary duty of winding up the affairs of the partnership. *Kent's Comm.*, 59, 60, 63; *Story on Part.*, §§ 307, 308, 261 and note; *Collyer on Part.*, §§ 110 (and note), 121, 125, 127, 166; *Marguand* v. *N. Y. manufacturing Co.*, 17 *Johns.*, 525; *Nicoll* v. *Mumford*, 4 *Johns. Ch.* 522; *Rodriguez* v. *Heffernan*, 5 *Johns. Ch.* 417, 428; *Crowshay* v. *Maule*, *Swanst.* 507.

Second. The dissolution caused by the sale to *Bell* by *Brooks* and *Moore* was only as regards the partners, and the subsequent transfer to *Bonney* by *Bell*, could not make the property his individual property without a notice of the dissolution of the partnership, and subsequent notorious possession of the goods by the surviving partner, and his receiving credit on the strength of that apparent ownership. *Ex parte Ruffin*, 6 *Ves.* 119; *ex parte Tell*, 10 *Ves.* 347; *ex parte Williams*, 11 *Ves.* 3. See also *Collyer on Part.*, § 884; *Story on Part.*, §§ 159 to 163, 308; 3 *Kent's Comm.*, 66, 67; *Bissett on Part.*, 71; *Gow on Part.*, 261; *Johnson* v. *Totten*, 3 *Cal.* 347.

W. H. Sharp, for defendant, Woods.

First. The pleadings and proofs do not show a case of equitable cognizance for the reasons

1. That the right of *Bonney*, *Brooks & Moore* to this specific property has never been admitted by *Woods;* consequently that *right* must be adjudicated upon, and can only be done by an action at law.

2. If partnership property, the pleadings and proofs show a trespass by *Woods* and *Scannell;* hence plaintiffs, or rather the copartners of *Bonney*, had a complete remedy at law. *Waddell* v. *Cook*, 2 *Hill* 47, and particularly note a.

3. A creditor at large of a partnership has no right to come into equity and restrain a creditor of an individual member of the firm from selling under execution such member's interest in the copartnership property. The copartners themselves have no such right.

Moody v. *Payne*, 2 *Johns. Ch.*, 548; *Phillips* v. *Cook*, 24 *Wend.*, 389; *Walsh* v. *Adams*, 3 *Denio*, 125 and 128. In this State this is fixed by statute. *Practice Act*, § 217 and 220. The case of *Meyer* v. *Larkin*, (3 *Cal.* 403) concedes this proposition.

4. The complaint does not pretend that plaintiffs have any equitable lien that the copartners do not have, nor does it pretend to be for the benefit of *all* the creditors. As creditors of the firm, they are compelled to work out any equity as such through the partners in an action to dissolve the partnership and obtain an account. This doctrine is recognised in *Nugent* v. *Locke*, 4 *Cal.* 318. If this bill had this object, it could not be sustained, because the title to the property is not admitted. *Mason* v. *Tipton*, 4 *Cal.* 276. Plaintiff acquired no lien on the property by attachment, because, *first*, the property was already in the custody of the law; and *second*, it was void in itself. *Practice Act*, §§ 125, subdiv. 2, 129.

Second. Conceding that this action is one of equitable cognizance, when *Woods'* attachment was levied, this property, by the several bills of sale and the delivery of the property itself, became the individual property of the debtor in that action, because,

I. Creditors of a partnership have no lien, *as such*, upon partnership effects. *Ex parte Ruffin*, 6 *Ves.* 127.

II. The sale by *Brooks & Moore* to *Bell* dissolved the partnership. *Marguand* v. *N. Y. Manufacturing Co.*, 17 *Johns.*, 525; *Moody* v. *Payne*, 2 *Johns.* 548; 3 *Kent's Comm.*, 65.

III. By invoking the clause in the bill of sale, "subject to the partnership debts," the plaintiffs must let go their hold upon any pretended lien arising from their being copartnership creditors. They must admit the right of him claiming under it.

Third. If then, plaintiff had any lien whatever, it must be by force of the bill of sale. They certainly had none under it, because,

I. There was no mutuality between the parties to it and plaintiff, nor any privity between *Bell* and plaintiffs.

II. The clause "subject to the partnership debts," was inserted to fix who were to pay the debts as between the parties to that bill of sale. The only legal interpretation it can receive is, that it is a covenant on the part of *Bell* with *Brooks & Moore*, to pay those debts.

Under it *Brooks & Moore* can compel *Bell* to pay them, or their creditors, through them can do so. But it will not be seriously contended that any creditor of the firm can sue *Bell* directly for a debt under it. How then can any creditor have a direct and specific lien under it?

III. If they had a lien, how could plaintiff issue an attachment? *Practice Act*, § 120.

Fourth. If plaintiff had a lien by force of the bill of sale it was void as to *Woods*. *Wood's Cal. Dig.* 107, *art.* 403.

NORTON, J.—The proofs taken in this action sustain the material allegations of the complaint, and the final decree must be governed by the principles announced in deciding the motion to dissolve the injunction and the demurrer to the complaint. The sale of *Brooks* and *Moore* to *Bell*, was of their interest in the copartnership property of the firm of *Bonney, Brooks & Moore*, subject however, to all its, the said firm's legal liabilities. This same interest was then transferred to *E. B. Bonney*, in whose hands the property in question was attached by the contesting parties in this suit. It is not material to consider whether the equitable right of copartnership creditors to be paid out of the copartnership property in preference to the individual creditors, is wholly founded upon the equities existing between the partners, or is a distinct right of the creditors to be enforced in equity after they have acquired a lien by seizure of the property. Practically the relief in equity is given upon the application of the creditors after their rights have matured. While the copartnership continues and before a specific lien has been acquired, the partners by mutual agreement may make any *bona fide* disposition of their property. *Greenwood* v. *Brodhead*, 8 *Barb.* 593, and *Story Eq. Jur.*, §1253. But in this case no such mutual agreement to apply this property to the payment of *Bonney's* individual creditors has been made. On the contrary, it is only the remaining interest or surplus after the firm debts are paid which *Brooks* and *Moore* sold. It is their equity as well as that of their creditors which will be worked out by this action. In truth *E. B. Bonney* might be treated as a trustee for these creditors as to the shares of *Brooks* and *Moore*, under the authority of the case of *Sedam* v. *Williams*, 4 *McLean* 51. The

propriety of interfering before the property has passed into the hands of purchasers at the sheriff's sale, and of making an equitable distribution of the proceeds instead of following the property in the hands of the purchasers, is asserted by Mr. *Story* on obvious reasons, 1 *Story Eq. Jur.* §678, and is sanctioned by the practice of the courts. *Washburn* v. *Bank of Bellows Falls*, 19 *Vermont* 278; *Place* v. *Sweetzer*, 16 *Ohio* 142; *Snodgrass* v. *Appeal*, 13 *Penn.*, 471. The distribution of the proceeds of the particular property attached without taking a general account of the copartnership affairs is sanctioned by the case of *Washburn* v. *Bank of Bellows Falls*, 19 *Vermont* 278.

There must be a decree for the distribution of the fund between the plaintiffs and the intervenors *pro rata* in proportion to their respective debts, and the surplus, if any, first to the defendant *Woods*, and then, to defendant *E. B. Bonney*.

PEOPLE EX REL. PATCH VS. BOARD OF SUPERVISORS.

Fourth District Court for San Francisco Co., Dec. T., 1857.

REVENUE — TAX COLLECTOR.

No rates of compensation to the tax collectors as fees are fixed by the statute of 1857 differing from, or changing those existing prior to its passage.

The tax collector and not the treasurer in the proper person authorised to collect and receive the taxes in the counties of this State from the persons assessed.

The consolidation act of the city and county requires all taxes to be paid directly to the treasurer; the treasurer is however, not authorized to collect them from the party assessed, but simply receives the taxes, as the depositary under the act.

The general revenue law of 1857, passed subsequently to the consolidation law, must have full force and effect given to its direct provisions when it conflicts with the act above referred to.

The tax collector is authorized to collect *all taxes* and directed to pay them over to the treasurer, and will be allowed his commissions as fixed by the act of 1855, on all taxes collected and paid over to the treasurer by him for city and county purposes.

This was an application for a *mandamus* to compel the board of

supervisors to audit the demand of *relator* for fees on delinquent taxes collected by him. The *relator* in his affidavit alleges that, as such tax collector, he had, on the fourth day of January, 1858, collected of city and county taxes, duly assessed and levied within and for said county, and for city and county purposes, the sum of $452,445, whereof $299,181 was collected by him in his said capacity on or before the third Monday of October, 1857, by virtue of the duplicate assessment list for 1857–8, delivered and charged to the said tax collector by the auditor, on or before the third Monday in September, 1857, all of which said several sums of money he has at various times paid over to the treasurer according to law. And that said tax collector, the *relator* herein, is entitled to have and receive commissions on the said sum of $299,181, for his official services in the premises, as provided by law. It is alleged the board of supervisors has refused and neglected to audit said demand, on the ground that said board has no authority to adjudge or consider the same; and that said *Patch* had no right or authority as tax collector, to collect taxes prior to the third Monday in October, 1857; and that the duty of collecting said taxes prior to said date, was devolved by law upon the treasurer of said city and county, and that in collecting taxes prior to said date, the *relator* exceeded his powers.

The supervisors contended that the county treasurer was the only party authorised to receive taxes up to the completion of the delinquent list on the third Monday of October, and that *relator* is not entitled to fees on money collected before that date.

Shafters, Park & Heydenfeldt, for plaintiff.

Janes, Lake & Boyd, for defendants.

Shafters, Park & Heydenfeldt, for the *relator*.

The question is whether the seventy-seventh section of the "consolidation act" has been repealed by the "revenue act" of 1857. (*Statutes of* 1856, 167, and *Wood's Cal. Dig.*, 612 *et seq.*) It has been so repealed and by necessary implication. Section 77 of the "con-

solidation act" relates to revenue as a subject matter and that section and the act of 1857 are therefore in *pari materia*, and consequently are to be considered in connection.

There are very many leading provisions in the act of 1857 which indisputably relate to this city and county as fully as to the other counties in the State: the provisions as to the board of supervisors and their powers in § 1,— as to the assessor in §3,— as to the board of supervisors and assessor in § 8,— as to the auditor's duty to *charge* the collector in § 34,— and as to the collector's duty in §§ 12 and 13, are all of this character.

Now, assuming that the provisions in § 8, which requires the auditor on the third Monday in September to deliver the assessment roll to the tax collector, is general, (and no terms of exception or restriction are used,) and further assuming that the provisions in §12 requiring the tax collector "upon receiving the list to proceed to collect the taxes," is also general, (and here again no exception is stated,) it is apparent that § 77 of the "consolidation act" devolving the duty upon the treasurer during the interval between the third Monday in September and the third Monday in October, is in conflict with the act of 1857, and is therefore repealed by it, by implication, and also expressly by the last clause of § 55.

But it was insisted that the authority of the treasurer under § 77 of the "consolidation act" is preserved by the proviso to § 44 and by § 56. There are three things entirely distinct in their nature: first, the power to levy taxes; second, the mode of levying them; and third, the mode of collecting them when levied, and these matters should not be confounded, but should be kept distinct in construing the proviso in question. Now by the very terms of the proviso, the "abridgment" spoken of, is treated in connection with the power of taxation only,— the word "thereto" clearly relating to the word "power"— as its antecedent. The last clause of the proviso, it is admitted, relates to the mode of levying and collecting, but the modes of levying and collecting in incorporated cities and towns, are alone saved and not the modes for levying or collecting in counties or in the city and county of San Francisco. The fact that "city and county

of San Francisco" are used in that clause of the proviso which affects the power to tax, and that the "city and county of San Francisco" is dropped in that part of the proviso which relates to the modes of levying and collecting, is quite satisfactory to show that the levying and collecting in this city and county was left to the operation of the general rule established by the previous sections of the act that have already been considered.

As to § 36, the first clause of the section ending with the word "existing," evidently refers to the power to levy taxes. The following clause bears solely on the rates of compensation for official service in the city and county of San Francisco, and provides in effect that they shall not be considered changed, and we do not now invoke the court for the purpose of having allowed to us any other or different compensation than that allowed by the act of 1855 to tax collectors. Nor are we asking that any "payment may be made out of the treasury not authorised by law" when the act of 1857 was passed. At that time tax collectors were entitled to commissions on all taxes lawfully collected by them, and treating that rule as still subsisting, *relator* is entitled to commissions on all taxes lawfully collected by him. He collects more under the law of 1857 than he could have done under § 77 of the "consolidation act," but the occasion and ground of compensation are all contemplated and provided for by the act of 1855. *Statutes* of 1855, 120.

Again, if the treasurer had made the collections prior to the third Monday in October, *relator* could have claimed commissions; for the list being *charged* to him by § 34, he must be regarded as the principal and responsible party, acting through the intervention of the treasurer.

Janes, Lake & Boyd, for defendants.

The *relator* insists that he is entitled to receive fees for all taxes collected according to the commissions allowed by the act of 1855. *Statutes* of 1855, 120. The respondent claims that he is not authorised by law to collect any taxes till default is made by the tax payers, or until they are delinquent.

By § 77 of the "consolidation act" (*Statutes* of 1856, 167) all

taxes shall "be payable and be paid directly to the treasurer," "and in default of such payment before the time when the tax collector may be authorised by law to seize and sell," "the said tax collector shall proceed to collect said taxes together with his legal fees by seizure and sale of the property liable in the mode prescribed by law for the collection of such state and county taxes. The taxes due however may be paid to the said treasurer at any time before the property is sold, and on production to the tax collector of the proper receipt and payment of his legal fees for services rendered up to that time, such property shall be discharged."

It is not deemed by the *relator's* counsel that under the above provisions of the "consolidation act" the treasurer is the proper person to collect taxes prior to tax paying being in default, but he insists that the "revenue act" of 1857, (*Wood's Cal. Dig.*, 612) works a repeal of those provisions, and that by its provisions San Francisco is embraced within the general revenue system of the State as to the mode of levying and collecting of taxes, from which she was specially excepted by the "consolidation act" of 1856. To maintain this proposition, there should be the clearest evidence of such being the intention of the legislature. So far from such intention appearing from its action, it was manifestly the contrary. At the time the "consolidation act" was passed, the "revenue act" of 1854 was in force and provided substantially the same mode for the assessment and collection of taxes as that contained in the act of 1857. See *Statutes* of 1854, 127, §§ 83, 84, 85, 87 and 88.

The object of the "revenue act" of 1857 was mainly to change the rate of taxation,—its purpose was not to interfere with any special laws then existing relating to incorporated towns. The "consolidation act" is the city's charter or constitution. It was matured with great labor and care. One of its main features is its provisions for an economical mode of government. To hold that the legislature has by implication repealed any of its provisions, would be to open the door for frittering away the entire charter by implicatien without the people being at all aware of the danger or destruction of the local government.

But aside from the general argument against the repeal, §§ 44 and 56 of the "revenue act" of 1857 expressly except San Francisco

from the operation of the law whenever it is in conflict with the chartered rights. See art. 4, § 25 of the constitution.

HAGER, J.—By the "revenue act" of 1857, it is made the duty of the assessor to complete the assessment roll, and deliver it to the clerk of the board of supervisors, on or before the first Monday in August, 1857. After this board disposes of the matters presented to them as a board of equalization, their clerk, on or before the third Monday in September, is required to deliver the corrected roll to the county auditor, who is required to deliver a certified copy to the tax collector, § 8. The tax collector, upon receiving a copy of the corrected roll, is directed to proceed forthwith to collect the taxes, § 12. When the tax is paid to the collector, he shall mark the work "paid" opposite to the name or property of the person liable for the tax, and give a receipt therefor, § 31. The auditor, upon receiving the roll, is required to charge the tax collector with the full amount of the taxes levied, § 34. The tax collector, on the first Monday in each month, must pay to the county treasurer all moneys collected for the state or county, and on the same day, present the treasurer's receipt for the same to the auditor, § 36. When the receipt of the treasurer is presented, the auditor must credit the tax collector with the amount thereof, and on the first Monday in February in each year, he must credit him with the amount of taxes delinquent, § 35. The county treasurers are required to settle with the state comptroller and pay over to the state treasurer the taxes collected for the use and benefit of the state, § 38.

By the amended act of 1855, p. 120, the tax collector of this county is allowed a certain per centage on all moneys collected and paid over by him, which is charged to the state and county proportionately to the amounts received by them respectively. The act consolidating the government of this city and county provides that "all taxes assessed upon real and personal property in this city and county shall be payable, and be paid, directly to the treasurer thereof," and in default of such payment the tax collector shall collect the same by seizure and sale of the property as provided by law; the taxes due, however, may be paid to the treasurer at any time before the prop-

erty is sold, and on the production, to the tax collector, of the proper receipt and payment of his legal fees, for services rendered, up to that time such property shall be discharged," *Statutes of* 1856, p. 167 § 77. And further, that the tax collector, upon final settlement, shall be charged with, and pay to the treasurer, all taxes collected by him, and not previously paid over, etc., § 78. The present law, fixing the fees of the tax collector, was in force and remaining unchanged by it or by the provisions of the amended revenue act of 1857; there are, then, no rates of compensation fixed by the act of 1857 different from, or changing those existing at the time it was passed.

The "consolidation act" does not, in express terms, say that *the party assessed* shall pay the tax directly to the treasurer, but that *all taxes* shall be paid directly to the treasurer. The treasurer is not named as the collector, but as the recipient, the depositary of the taxes. The act of 1857 does, in express terms, authorise the tax collector to collect all taxes, give receipts therefor, and also directs him to pay them over to the treasurer, who is the depositary under this act. If the tax moneys do not go through the tax collector's hands, he is not entitled to commissions, for he is only entitled to charge them on the moneys "collected and paid by him." The one act and the amendments thereto are *general* laws; revenue is the object and subject matter, and it authorises and provides the entire mode of assessing and the machinery for collecting it. The other act is intended to provide a government for the city and county of San Francisco. It partakes of the character of a special law, and is local in its operation. Revenue is not its subject matter, but an incident connected therewith, and dependent upon the general laws relating to that subject. The several statutes are not, then, strictly speaking, *pari materia*. So far as respects the taxes assessed and collected for the state, there can be no question but the tax collector, and not the treasurer, is the only person authorised to collect or receive the taxes from the persons assessed. There is more difficulty, however, in regard to the taxes levied for city and county purposes. It is intended by the § 77 of the "consolidation act" that the treasurer alone is authorised to receive the taxes prior to a default for their payment, then there is a conflict between this act and that of 1857, and the

exact meaning of §§ 44, 56 of the act of 1857 becomes important. But according to my views, if it is admitted there is an existing conflict, then this § 77 cannot be observed without violating the provisions and to some extent deranging the operation of the subsequent general law. It must in such case yield, and full force and effect must be given to the direct and positive provisions of the act of 1857, to wit: that the tax collector is authorised to collect all taxes and directed to pay them over to the treasurer. It results, then, that the *relator* is entitled to his commissions as fixed by the act of 1855, on all taxes assessed by the city and county of San Francisco for city and county purposes, which have been collected by the *relator* and paid over to the county treasurer, and that defendant should audit his bills accordingly. Peremptory *mandamus* to issue accordingly.

DYE vs. DYE.

Twelfth District Court for San Francisco Co., Dec. T., 1857.

DIVORCE—COMMON PROPERTY.

A. and B. were divorced by a decree of the Fourth District Court, but no division of the property then held in common was made. B., the defendant in the action for the divorce, then brought an action in the Twelfth District Court to obtain a decree ordering this division, but did not allege in the complaint that any portion of the property had been acquired subsequent to the passage of the act of 1850, which adopted the civil law of the community, as the law governing marital rights in this State.

Held, on demurrer to the complaint, that the decree could only be entered in the court which granted the divorce, and that the complaint was insufficient, in failing to aver that the property had been acquired subsequent to the passage of the act of 1850.

The facts are sufficiently reported in the opinion.

Thompson, Irving & Pate, for plaintiff.

Stanly & Hayes, for defendant.

NORTON, J.—This is an action instituted by plaintiff, praying that an account of certain property may be taken, and a moiety thereof be

decreed to be paid to her. It appears that some years ago, that is, in the month of January, 1853, the parties were divorced by a decree of the Fourth District Court, but that no partition of the property which is now alleged to have been then holden in common between them, and to have been acquired subsequently to their marriage, was made.

In that action the present plaintiff was defendant.

The defendant now demurs to the complaint, and among other points raises the following:—first, that this court has not jurisdiction in the premises; and second, that it is not alleged that the property set forth and described in the complaint, was wholly or in part acquired subsequently to the passage of the act of April 17th, 1850. (*Wood's Cal. Dig.* 487.) Both of these grounds I think well taken. The section of the act of 1850 (*ib.*, 488, art. 2615) upon which plaintiff must rely as the authority for granting the relief which she seeks, if it be granted at all, directs the manner in which the partition of the property held in common at the time of entering the decree of divorce, shall be made. Among its provisions upon the point, there are none which confer any power or authority upon this court, or upon any other except that in which the original action was brought, and by which the decree of divorce was entered, to order the partition and enter the decree now prayed for by plaintiff. If at this day this action can be maintained at all, I think that it can only be done in the Fourth District Court, to obtain there a decree in its nature supplementary to that dissolving the bonds of matrimony.

Argument was made as to what was the law of the community under the Mexican rule,—but I think a consideration of that question unnecessary on account of the objections raised by the second point of the demurrer. After determining the *manner* of the partition, the said act of 1850 declares that its provisions apply to all "property hereafter acquired,"—a clause which, from its terms, prevents this law from being construed retrospectively, so as to attach to property acquired prior to that date,—and it is not alleged that any of the property referred to in the complaint was acquired subsequent to that time.

Demurrer sustained, with leave to amend.

SMILEY vs. THRALL.

Twelfth District Court for San Francisco Co., Dec. T., 1857.

PUIS DARREIN CONTINUANCE.

A. being a dentist, in an operation on B.'s teeth, broke one of them. B. published a card in relation thereto, in the newspapers, and A. brought an action against him for libel, in which B. pleaded and proved the injury to his teeth as matter in mitigation. After the commencement of that action, B. brought this against A. to recover damages for injury to his teeth. The action for libel was first concluded, and A. filed a plea in this setting up that in the previous action the subject matter of this had been considered by the jury and passed upon.

Held that the plea was in the nature of the common law plea *puis darrein continuance*, and therefore a waiver of all pleas previously interposed.

The plaintiff brought suit for an alleged injury sustained by him to his teeth at the hands of the defendant, who is a dentist. It was brought subsequent to one commenced by defendant in this action against *Smiley* for an alleged libel. In that case the plaintiff in this action pleaded in mitigation of damages the same matter of injury to his teeth set forth in his complaint in this action, and at the trial introduced evidence under his plea, and the evidence was taken into consideration by the court and jury.

After issue had been joined in this action, and a term had elapsed, the counsel for defendant in this action obtained a stipulation for leave to amend the answer and set up the above facts, which had occurred after the issue joined in this action, as follows:

"That said plaintiff ought not further to maintain his action against said defendant, because he says that in a certain other action in this honorable court in which this defendant was plaintiff and the above named plaintiff was defendant, tried and determined on the 23d day of September, 1857, the same subject matter set forth in the complaint in this action, as cause of action of complaint against this defendant, was pleaded by the above named plaintiff by way of offset and justification, and in mitigation of damages to the cause of action alleged in that action, under which said plea evidence was offered on behalf of the plaintiff and allowed by the court, and the evidence duly considered by the jury, who found the verdict accordingly,—and so said de-

fendant says the cause of action alleged in the complaint has been already adjudged and determined."

At the trial the plaintiff raised the point that this plea is a waiver of the plea previously interposed.

Shafters, Park & Heydenfeldt, and *E. Cook*, for plaintiff.

S. M. Bowman and *D. O. Shattuck*, for defendants.

NORTON, J.—This plea is of the nature of what under the old system of pleading, is the plea *puis darrein continuance*, and as such, is of itself a waiver of all pleas which may theretofore as matter of defense, have been interposed. Plaintiff by his stipulation has merely agreed that it may be interposed, but has not affected thereby his right to take advantage of all its legal effects and consequences. Defendant may, however, if he see fit, withdraw the plea and proceed to trial upon the issues raised by his original answer.

The plea was withdrawn, and the action tried on the former issues.

HENDRICKSON vs. HILLMAN.

Twelfth District Court for San Francisco Co., Nov. T., 1857.

DEMURRER—REPLEVIN BOND—DEMAND—CONSTRUCTION.

In an action on a replevin bond it is not necessary to aver a demand made upon the defendant before the suit was brought. *Nickerson* v. *Chatterton*, 7 *Cal. April T. Hunt* v. *Robinson*, 7 *Cal. Oct. T.*

Although the averments of a complaint must be construed according to common understanding, yet this must be regarded as being the common understanding of a person acquainted with the subject, and applied to all the provisions of the law upon this subject.

Action on a replevin bond. The facts are sufficiently given in the opinion.

Shattuck, Spencer & Reichart, for plaintiff.

Bennett & Stebbins, for defendant.

NORTON, J.—This is an action brought on a replevin bond. The

plaintiff alleges that in an action commenced and determined in the Twelfth District Court, defendants *Hillman* and *Philips* executed a replevin bond to one *Scannell*, then sheriff of the city and county of San Francisco, in consideration whereof *Scannell* released certain property belonging to *Parker & Weller*, seized by him under a writ of attachment issued in an action wherein one *Featherly* was plaintiff, and *Parker & Weller* defendants, and delivered possession of said property to the said firm, who have eloigned the same,—and that by the judgment of the said court, said property, valued at one thousand dollars, was adjudged, "to be returned to said plaintiff if to be found, and if not, the said defendant *Scannell* should recover of the said plaintiff *Featherly* the sum of one thousand dollars, together with costs of suit, taxed at the sum of eighty-one dollars." That in that action plaintiff was the real party in interest, and that since then *Scannell* has assigned the replevin bond to him. That the property has not been returned, nor the money paid. The defendant puts in a demurrer on the ground that the complaint does not set forth facts sufficient to constitute a cause of action, and contends, first, that there is no allegation of a demand on the defendant before this action was brought, and secondly, exception is taken to the form of the bond not having the conditions prescribed by the statute.

But the first ground of demurrer is met by two decisions of our Supreme Court, both upon the same point, and in each of which they decide that in this class of cases no averment of a demand is necessary.

With respect to the second exception, the difficulty seems to have arisen from some ambiguity caused by the punctuation in one of the sections of the Practice Act, in this regard, but I do not think there is anything of importance in the objection.

The next ground taken by the defendant is, that it is not alleged in intelligible language what was the judgment in the action in which the replevin bond was given, which was rendered in favor of plaintiff.

The judgment in replevin is that the plaintiff is entitled to a return of the specific property with damages for its detention, or if the return cannot be made, then for its value.

In this case, instead of following the exact language, plaintiff has put it all together in one allegation, as already mentioned. The point

made is, that in this form the allegation does not signify anything in particular, or that if it does signify anything, it is that plaintiff was entitled by the judgment to have the property returned to him, provided he could be found so as to have that ceremony performed. But I think it will do. Although, as defendant contends, the averment must be construed according to common understanding, yet this must be regarded as being the common understanding of a person acquainted with the subject, and applied to all the provisions of the law upon the subject; and according to such understanding I think that there is no fatal uncertainty in the complaint.

Demurrer overruled with leave to answer.

HARDY vs. HUNT.

Sixth District Court for Sacramento Co., Dec. T., 1857.

BAILMENT.

An action is properly brought in the name of the principal to recover back a deposit made by his agent.

A party who deposits money with a stakeholder parts with no property therein so long as it remains in the possession of the latter, and until he should have paid it over, the creditors of the depositor could acquire a lien upon it by attachment.

On motion for a new trial upon alleged error of law appearing in the finding of the court in a former trial. The facts of this case as well as the finding of the court are reported in 1 *Cal. District Court R.* 330.

Smith & Hardy, for plaintiff.

Winans & Hyer, for defendant.

BOTTS, J.—*O'Brien* was authorized by plaintiff to bet $500 for him upon the election of sheriff; he made the bet in his own name, with one *Harris;* the plaintiff gave him a check to enable him to put up the money; *O'Brien* drew the money upon the check, and deposited it with the defendant as stakeholder, without disclosing his prin-

cipal, but treating the money and the bet as his own. The creditors of *O'Brien* attached the money in the defendant's hands, and the defendant, under an order by the justice from whose court the attachment issued, paid the money to *O'Brien's* creditors. In compliance with an arrangement between the plaintiff and *Harris*, four hundred dollars of *Harris'* deposit were returned to him, and the remaining one hundred were paid to the plaintiff by the defendant; the sum of $70.70, the remainder of *O'Brien's* deposit, after deducting the amount paid to *O'Brien's* creditors, was paid over by defendant to plaintiff. This action is brought to recover $429.30, the amount paid by defendant to the creditors of *O'Brien*.

Upon the trial of this cause, I thought that the plaintiff had no right of action against the defendant, for want of privity. Thus it was held: J. being an attorney authorized to receive rents due his client, went away, leaving his clerk with directions to collect these rents in his absence; he never returned; the clerk collected the rents; but in an action by the client, it was held he could not recover, for want of privity. See 1 *Salkeld*, 28, 11 *Mod.* 146.

B., the managing owner of a ship, employed C. to collect moneys due the ship. The part owners sued C. for the moneys so collected. Held, that there was no privity. *Darnton* v. *Pigman*, *Peake's Ad. Cas.* 111.

In *Williams* v. *Everett* 14 *East.*, 597, it was held by lord ELLENBOROUGH, that no action lay by one for whose benefit a bill is remitted, until the person to whom the bill is remitted is connected with the beneficiary by a promise to pay.

In *Carnegie* v. *Morrison*, 2 *Metcalf* 391, a deposition of *Sir F. Pollock*, now *Baron Pollock*, of the Exchequer, was read, to the effect that, by the law of England, no action could be maintained by A. against C. for money deposited for his use by B.

There is no doubt these authorities are in direct opposition to many American cases, and the plaintiff now produces two cases directly in point. The first is that of the *Duke of Norfolk* v. *Worthy*, 1 *Campb.* 337; and the second is, *Yates* v. *Foot*, 12 *John.* 1. In the first case, the *Duke of Norfolk* sues to recover back a deposit made by his agent, the deposit being made by the agent in his own name. Lord ELLEN-

BOROUGH held that the suit was properly brought in the name of the principal, and this decision was affirmed by the court of King's Bench. The second case was identical with the one at bar, and chancellor KENT held that the action could be maintained by the principal, and in this opinion he was sustained by the whole court of errors. I cannot oppose my own opinion to that of chancellor KENT and the court of King's Bench.

But it is contended that, even if upon general principles the plaintiff could sue for the money deposited by his agent, there are circumstances connected with this case that would render this recovery inequitable. It is urged that the plaintiff having clothed *O'Brien* with the *indicia* of ownership, he cannot now contest the lien of *O'Brien's* creditors. It will be remembered that the debts of *O'Brien*, on which these attachments were issued, arose long prior to this transaction, so that it can hardly be pretended that these creditors trusted *O'Brien* upon the faith of the ownership of this money which the plaintiff permitted him to assume. If the plaintiff can entertain this action at all, it must be upon the ground of his title to the property bailed to the defendant. If the money deposited with the defendant was the property of the plaintiff, it is difficult to understand how it could be subjected to the debts of a third person. We are referred to the case of *Ball* v. *Gilbert*, 12 *Metcalf* 397. That case, if it be law, decides no point in this case. There it was held that wagers upon elections were void: that money deposited upon such a wager continued to be the property of the depositor as long as it remained in the hands of the stakeholder; and, undoubtedly, under that decision, the creditors of the depositor might secure a lien by attachment. In other words, that court ignores any interest in the winner of the wager. But that case does not determine the point in issue here, which is, who is the real depositor, *O'Brien* or *Hardy?* Upon the authority of *The Duke of Norfolk* v. *Worthy*, and *Yates* v. *Foot*, I am constrained to hold that the plaintiff, *Hardy*, was the depositor of the money, and that it was not liable for the prior debts of his agent, *O'Brien*.

The motion for a new trial is granted.

LAWRENCE vs. KNIGHT.

Twelfth District Court for San Francisco Co., Nov. T., 1857.

DEMURRER—LEASE—CONSTRUCTION.

A. leased land to *B.* for a term of years; *B.* to put up buildings and *A.* to buy them at the expiration of the term, at a value to be fixed by appraisers who were to be appointed at least sixty days before that date. *A.* possessed the right of eviction in case of non-payment of rent. About two years before the expiration of the term by lapse of time, *A.* re-entered upon the premises under the last mentioned covenant. After receiving notice to quit, *B.* appointed his appraiser, and about thirty days afterwards was evicted by *A.* *B.* now brings this action for the recovery of the value of the buildings, alleged to be $15,000.

Held, that the action was prematurely brought; that the omission in the lease of the ordinarily inserted clause, "or upon other sooner determination of the said term," seemed to show that the parties intended by the word "term," to refer to the entire period for which the lease was originally made; that the covenant for the appointment of appraisers a certain number of days before the determination of the term, had great weight in sustaining this construction, for unless that period be fixed beforehand, neither party could comply with the conditions of this covenant.

Objection to a complaint, that it does not show that the action is local, or that the plaintiff or defendant is a resident of the county in which the action is brought, cannot be taken by demurrer, unless the contrary appears affirmatively upon the face of the complaint.

The material facts are set forth in the opinion.

E. A. Lawrence, for plaintiff.

Shattuck, Spencer & Reichart, for defendants.

NORTON, J.—This is an action brought to recover the value of certain buildings erected by plaintiff's assignor, on property leased to him for a term of years by the defendant. The term has about two years more to run. The foundation of the action is one of the covenants of the lease, which, after reciting that within a certain time the lessee should erect a brick house upon the lot, provides that within a year "after the expiration of the term" defendant should pay the value of the buildings so erected. It appears that on the 4th of August, 1857, defendant, on account of the non-payment of rent, re-entered upon the premises under one of the covenants of the lease which authorises him so to do under the circumstances.

The lessee now claims that this act, by determining the term, entitles him, under the above covenant, to recover the value of the buildings, which is alleged to be $15,000. Defendant demurs upon the ground that the complaint does not show that the time has elapsed within which the defendant was to pay for the improvements, and that plaintiff has therefore any cause of action. The question principally turns upon the construction of the word "term,"—whether it shall be construed to mean the entire seven years as expressed in the lease, or merely, as plaintiff contends, the duration of his estate in the land.

The only authority which he has cited to support this construction is a remark made by one of the judges in *Barroilhet* v. *Battelle*, (7 *Cal. April T.*). This remark, however, was made incidentally, and by way of illustrating the argument upon which the judge was then engaged, and was not a decision upon a point directly before the court, and the case supposed was not qualified as this is in regard to the appointment of appraisers.

With regard to the phraseology of this lease there is also a peculiarity. Ordinarily, in a case like this, there is added the clause "or upon other sooner determination of the said term,"—which, had it been inserted in the present instance, would have obviated all difficulty so far as this point is concerned, and its omission would seem to indicate that the intention of the parties was to refer by the word "term" to the entire space of time for which the lease was originally made, and in which case plaintiff could not maintain his action until the expiration of the seven years.

It is true that the word "term" frequently is employed to signify the duration of an *estate*, and as such may be concluded in various ways, as by forfeiture, &c.—but it is also often, and more particularly in its ordinary acceptation, used to express a determinate quantity of time,—and in this sense can be neither hastened or shortened by any acts or operations of the parties or of law. This I think must be its interpretation in the present case.

There would also be considerable difficulty in determining this question in any other way, for it is further covenanted that at least sixty, and not more than ninety days before the expiration of the term, the value of the buildings should be determined by appraisers to be ap-

pointed by the parties,—a condition with which neither of them could comply, unless the particular point at which the period is to terminate be fixed beforehand. This case now arises. The complaint alleges that on the 13th of June, *Knight* served a notice on the tenants in possession to quit on account of non-payment of rent,—that afterwards on the 1st of July plaintiff notified *Knight* that he had appointed an appraiser, requesting him to do likewise, which he refused. The eviction was on the 4th of August, thirty days after the appointment by *Lawrence*, and about fifty after service of the notice to quit, both being less than the sixty days provided for. This provision has not been and indeed could not be complied with in this case, and this provision has great weight in determining that the word "term" in this regard was meant by the parties to mean a fixed period, of which both parties had notice by the terms of the lease.

Another ground of demurrer advanced is that it does not appear from the complaint that the action is local, or that either plaintiff or defendant is a resident of the city and county of San Francisco. It does not appear, however, that plaintiff is not. The allegation is that *Knight*, the defendant, "of Napa Co.," by his attorney in fact executed the lease, and that through various assignments therein set forth it has come to plaintiff's possession. Advantage of such an objection cannot be taken by demurrer, unless the fact appears affirmatively in the complaint.

The demurrer is sustained upon the grounds, first that the word "term" in the covenant which provides for the payment for the buildings must be construed to mean the entire period of the lease, and secondly that plaintiff has not shown such a compliance on his part with the other portions of the agreement as entitles him to enforce it against the defendant.

Demurrer sustained, with leave to amend upon payment of costs.

LANDER vs. SMITH.

Sixth District Court for Sacramento Co., Dec. T., 1857.

ASSETS—JURISDICTION.

The residence of the debtor, at the death of the creditor, determines the jurisdiction of the assets, and it is doubtful whether a judgment obtained by an administrator, in his own name, can affect this jurisdiction.

Before the question of jurisdiction can arise, it must appear where the debtor did reside at the death of the creditor.

On demurrer to the complaint specifying as ground for demurrer, that the plaintiff has not legal capacity to sue. Argument was had on the question of law and was decided by this court, and the facts and opinion will be found in 1 *Cal. District Court R.*, 318. A rehearing was granted at the instance of plaintiff, and the question again submitted to the court.

(The names of counsel have not been furnished.)

Botts, J.—When this case was presented before, I sustained the demurrer. A rehearing having been granted, the subject has been handled with great ability by the counsel on both sides. They both referme to the case of *Hall* v. *Harrison*, 21 *Missouri*, 227. The defendant, particularly, relies on this case to sustain his position. Now that case is exactly in point, and as the reasoning of the learned judge who decided it meets my entire approbation, I shall make it the guide to my decision in this.

Judge *Leonard* thinks that much may be said in support of the doctrine that the residence of the debtor at the death of the creditor determines the jurisdiction of the assets; and he, at least, doubts whether a subsequent judgment, obtained by an administrator in his own name, can affect this jurisdiction. But he says, before that question can arise, it must appear where the debtor did reside at the death of the creditor. In the absence of any such showing, everything will be intended in favor of the judgment obtained by the administrator; and therefore, as he overruled the demurrer in that case, I shall overrule the demurrer in this.

SMILEY vs. FULDA.

Fourth District Court for San Francisco Co., Dec. T., 1857.

INJUNCTION—AFFIDAVIT.

To obtain an injunction the material allegations of the complaint should be positively sworn to, or if they are upon information and belief they should be supported by the affidavit of the parties from whom the information was derived.

This action was brought by *Smiley*, the plaintiff, against *Fulda*, the defendant, and his creditors, who had gained priority by some fraud, on *Fulda's* failure, which facts plaintiff alleged in his complaint on information and belief, but failed to set out who the parties were that gave him the information, or annexing their affidavit to the complaint, and thus disclose to the defendant the real merits of the information and enable him to make a proper defense.

The defendant moved to dissolve the injunction, on the ground that sufficient source of information was not clearly shown, and that the defendant was entitled to that.

Janes, Lake & Boyd, for plaintiff.

Eugene Casserly, for defendant.

Plaintiff's counsel have no brief on file.

Defendant's counsel cited the following authorities in support of the motion to dissolve the injunction:

An injunction cannot be allowed on mere information and belief. The material allegations must be sworn to positively. *Room* v. *Webb*, 3 *How. Pr.* 328; *Pomeroy* v. *Hindmarsh*, 5 *ib.* 437; *Minor* v. *Terry*, 6 *ib.* 210; *Rateau* v. *Bernard*, 12 *ib.* 464; *Crocker* v. *Baker*, 3 *Abbott Pr.* 183, and cases there cited; *Campbell* v. *Morrison*, 7 *Paige* 157; *Bank of Orleans* v. *Skinner*, 9 *ib.* 305; *Woodruff* v. *Fisher*, 17 *Barb. S. C.* 224; *Perkins* v. *Collins*, 2 *Green's Ch.* 482, 1 *Barb. Ch. Pr.* 617.

HAGER, J.—By the statute law of this state, *Practice Act section* 113, an injunction may be granted if it is satisfactorily shown by a verified complaint, or by affidavits, that sufficient grounds exist therefor.

The allegation in this complaint, charging fraud and collusion between defendants, *Fulda* and *Trieste*, and which are relied upon as disclosing sufficient grounds for the issuing as well as continuing the injunction, are solely upon information and belief, and are unsupported by the names or affidavits of the parties from whom the information was derived.

According to the rule of pleading in equity, in order to obtain an injunction, the essential and material allegations of the complaint should be positively sworn to; or if they are upon information and belief, they should be supported by the affidavit of the parties from whom the information was derived, or the absence of those should be satisfactorily explained.

Here, for want of proper information of the persons who informed plaintiff, the defendant is unable to inquire into the truth of the allegations, or to contradict them by his answer or other affidavits.

I am of the opinion that it is not satisfactorily shown by the complaint, that sufficient grounds exist for the issuing or continuing the injunction. Injunction dissolved.

GOODWIN vs. IRWIN.

Fourth District Court for San Francisco Co., Dec. T., 1857.

JURISDICTION—DEMURRER.

The service and return of a summons is sufficient to give the district court jurisdiction of the person of the defendant, when the action is brought to recover more than $200.

An action may be properly *brought* in one county, although the *place of trial* is in another.

When the action is *brought* in one county and by law is triable in another county, the remedy is not by demurrer, but in a motion to change the place of trial.

The plaintiff, a resident of San Francisco city and county, brought this action of replevin against defendant, the sheriff of Sierra county.

Defendant demurred to the complaint on the following grounds:

1st. That this court has no jurisdiction of the person of the defendant or the subject of the action.

2d. That the complaint does not state facts sufficient to constitute a cause of action.

Harmon & Labatt, for plaintiff.

W. W. Crane, for defendant.

HAGER, J.—The summons has been regularly served and returned, which is sufficient to give the court jurisdiction of the person of defendant, and the subject of the action being to recover $2,000 damages for the unlawful taking and detention of plaintiffs' personal property, is solely within the jurisdiction of the district courts.

In support of the demurrer, it is urged that inasmuch as it appears by the complaint that defendant is sheriff of the county of Sierra, it must therefore be inferred that he is sued for an act done in virtue of his office; and under § 19 of the *practice act*, the action must be tried in that county. This does not follow. A court may have jurisdiction of the person and subject of the action even if the proper county is not named and the defendant is entitled to have it tried in another county. The action, even if it be against the sheriff, for an act done in virtue of his office, may be properly brought in this county, although the place of trial may be in Sierra county. The language of the *practice act* applicable to such cases, is, that it "shall be tried"—not that it shall *be brought* "in the county where the cause, or some part thereof arose;" and § 21 authorizes the court to change the place of trial, when the county designated in the complaint is not the proper county. By this complaint, it does not appear that defendant is sued for an act done in virtue of his office, or that the cause of action, or any part thereof, arose in the county of Sierra. If such, in fact, be the case, the transfer will be ordered when it is made to appear, but it is not a ground of demurrer. Judgment for defendant upon this ground of demurrer would not transfer the action to the proper county or determine whether the plaintiff, if the allegations of his complaint are true, ought to recover.

If it appears by the complaint that another county is the proper place of trial, it would be correct practice for the defendant to move for a transfer to that county, upon the complaint; if it does not so appear,

the motion to change the place of trial should be made upon the answer or affidavits. Whenever it is made to appear that the place of trial is in another county, I will consider it my duty to make the transfer, whether the parties ask it or not.

The second ground of demurrer I think is not well taken. Demurrer overruled.

BROWN vs. LEAVENWORTH.

Fourth District Court for San Francisco Co., Dec. T., 1857.

AFFIDAVIT—DEFAULT.

An affidavit of merits and facts to open a default is not sufficient if sworn to on information and belief,—the affidavit of the informant or the grounds of belief should also be offered.

This was a motion on the part of the defendant to open a default entered against him, and an affidavit of his attorney was read upon which the motion was based. It recited facts the information of which were derived from defendant, but failed to present the affidavit of defendant corroborating this information. There was nothing before the court to warrant a belief in the information.

McDougal & Sharp, for plaintiff.

J. V. Wattson for defendant.

HAGER, J.—The affidavit relied upon for opening the default is made by the attorney, and the material allegations are mostly upon the information of the defendant, *Leavenworth*. As I ruled in the case of *Smiley* v. *Fulda** the allegations should be positively sworn to, or, if upon information and belief, the affidavit of the informant should also be procured. *Leavenworth* should have made or joined in this affidavit, to entitle it to a favorable consideration. Motion denied.

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*Ante p. 84.

GUY vs. JAMES.

Fourth District Court for San Francisco Co., Dec. T., 1857.

CONSIGNEE—DISBURSEMENT—BOTTOMRY BOND.

The mere fact of a disbursement having been made by the consignee of a ship coupled with an authority to make disbursements is not sufficient to charge the owner for money supplied to the master, or any other person, where there is no proof, or from the character of the payment itself there is no presumption, that it was necessary for the use of the ship or beneficial to the owner.

A consignee in redeeming a bottomry bond made in *itinere* will be presumed to have acted in good faith in the absence of proof to the contrary.

Money paid for port charges, and in discharging the cargo will also be presumed to have been paid in good faith and be allowed as necessary charges against the ship in the absence of proof to the contrary.

This action was instituted on the 23d of August, 1855.

The object of it is to recover the sum of $3,737 for services and money, paid and performed by *Guy*, the plaintiff, for account of defendant. These services and advances were made and done by the plaintiff in June, July and August, 1854, as agent and consignee of the ship *Hibernia*, of which defendant *James* was the owner.

By charter party, dated April 21st, 1853, which was in evidence, it appeared that the *Hibernia* was to carry a cargo of coals from Cardiff, in Wales, to San Francisco; that she was to be addressed to charterer's agent who was to do the ship's business on usual terms, at the port of discharge, the "cargo to be brought and taken from alongside at merchant's risk and expense, and not exceeding what she can reasonably store and carry over and above her tackle, apparel, provisions and furniture; and being so loaded she shall therewith proceed to San Francisco, &c., and deliver the same on being paid at and after the rate of £4 10s sterling per ton of 20 cwts. delivered."

It was further made to appear that the vessel encountered a peril of the sea on the voyage and had to put into Valparaiso for repairs, where she took up money on bottomry. She arrived at this port on the tenth day of June, 1854, and the bottomry, amounting to $12,828, was paid, a few days after her arrival, by *Guy*.

By a letter of plaintiff, put in evidence by defendant, it appeared

that captain *Claverly*, (the master who brought the ship to this port, and who was afterwards succeeded by captain *Knox*,) had written for funds to pay the bottomry, and that on the 30th of June, 1854, he expected to receive them. On that day *Knox*, who had in the interim succeeded *Claverly*, repaid *Guy* the amount.

Hepburn, for plaintiff:

It is contended that we are not entitled to be repaid the amount advanced to discharge the bottomry, while yet we are to be debited with the same amount which we received from *Knox*. The first answer is that the peril of the sea and the general average being shown, the consignee, in a foreign port, was fully justified in paying the average, and it is for the defendant to show that it was fraudulent. But the second answer is that the circumstances under which the reimbursemeut of *Guy* by *Knox* was made, show conclusively that it was done under instructions from his principal and out of the funds which had been written for to pay the bottomry.

The position that plaintiff is not entitled to a credit for the advance made to captains *Knox* and *Claverly*, because he has offered no proof that they were necessary and that this necessity is the only ground on which the captain can bind the owner, is not tenable. The answer is that *Guy* was directed to do the ship's business, not by the authority of the captain, but by a direct contract with the owner himself; it appearing from the terms of the charter party that he was the owner's agent and was to do the ship's business on usual terms at the port of discharge. The reason why a consignee or material man, in order to recover against an owner for advances or supplies, is obliged to show that the advances or supplies were necessary, is that the rule only applies to cases where the transaction is made by the captain in the absence of the owner and without express authority from him. In such cases proof of necessity is indispensable, for it is out of this fact that arises, by implication of law, the consent of the owner to the act of the captain. But here *Guy* is the charterer's agent who is to do the ship's business at usual rates. He has then an express authority from the owner to disburse the ship, the charter party being equiva-

lent to a letter of instructions to that effect. Instead of being instructed to fit out a ship for a return voyage, suppose he had been ordered to buy and fit out a ship for a new voyage; in order to recover in such a case, can it be contended that he would be obliged to show anything but the fact of his disbursements, or in other words, obedience to orders? Improper conduct, unfairness, fraud, over-charging, &c., is all competent evidence for the defense; but the fact of disbursement coupled with the authority to make it, is all that is necessary to establish the plaintiff's case.

The provision of the charter party relative to the loading of the ship at merchant's expense applies, as will be seen from its terms to the loading at Cardiff, and not to the unloading at San Francisco, and that charge is therefor properly laid to the ship.

H. B. Janes, for defendant, reply:

First. The creditor must prove the necessity and character of the advance to the master. *Abbott on shipping*, 135, 139; he cannot retain money of the owner for advances made to the master. *Buckley* v. *Packard*, 10 *Johns.* 421.

Second. A bottomry can only be made by the master upon a necessity to be clearly apparent, and this must be shown by the lender. *The "Fortitude,"* 3 *Sumner* 228.

I. A consignee as assignee of the lender, could not deprive the owner of this protection against fraud by the master, and especially when, as in this case, the bottomry is paid for the benefit of the consignee himself, for in this instance the consignee owned the cargo and did this to protect himself. *Smith's mercantile law*, 500.

II. The consignee, before he can recover advances on bottomry, must establish the necessity, the fairness of the transaction and that he was not a debtor to the ship at the time. *The "Fortitude,"* 3 *Sumner* 228; *Smith's mercantile law*, 500.

III. It is not shown that the instrument was a bottomry. It may, for aught that appears, have been the first of two bottomry bonds, and not entitled to priority of lien. As to the requisites of such a bond, see *Abbott on shipping*, 153, 158.

IV. Libellant must show all the requisites to a bottomry—none

can be presumed. *The* "*Aurora*," 1 *Wheat.* 96; *The* "*Fortitude*," 3 *Sumner* 228.

V. Before payment, libellant should have given notice to the master, and advised with him as owner's agent, or with the owner himself. *Smith's mercantile law*, 145. An agent cannot be reimbursed for payment made out of the regular course of business, unless he can show circumstances from which the principal's authority may be inferred. *Ib.* 156.

Third. The items of expense for discharging the cargo, are improperly charged to the ship's account, because the charter specifies that "the cargo shall be discharged at merchant's expense."

HAGER, J.—The defendant is the owner of the British ship *Hibernia*, which arrived at this port from Cardiff, England, under a charter party, with a cargo of coal consigned to the plaintiff.

The plaintiff brings this suit to recover for services and disbursements made as consignee, on account of defendant.

Some of the disbursements have been admitted, others are disputed and are of various classes:

1st. Among those claimed and disputed are several items of payments made, at different times, by the plaintiff to the master of the ship while in port. As a general rule, to sustain an action for such items, it must appear that the advances of money made to the master were for the use of the ship, and that they were warranted by the exigency of the case. There being no special directions from the owner, or evidence to prove the existence of any actual necessity for these supplies of money, or that they were expended or appropriated for the use of the ship, they cannot be allowed. It is true the plaintiff had authority to make disbursements; but the mere fact of a disbursement having been made, coupled with the authority to make it, is not sufficient to charge the owner for money supplied to the master or to any other person, when by the character of the payment itself there is no presumption that it was for the benefit of the ship or owners. If either the payments to the master had been for the use of the ship, the plaintiff should have supplied the necessary proof to establish that fact.

2d. For money paid to discharge a bottomry bond given, *in itinere*, at Valparaiso, $17,727.

If this was an action upon the bottomry bond, the points and authorities cited and relied upon by defendant, would have been applicable; but here whether or not the hypothecation was justifiable or necessary, is not in controversy. The plaintiff was neither directly interested nor a party to it; but upon the arrival of the ship at this port, as consignee and agent of the owners, and on behalf of all parties in interest, it was his duty to inquire into and determine the necessity of the hypothecation, and if he deemed it advisable, to discharge it without compelling the holders to resort to, or subjecting his principal to the expense of, an action. In making this payment, he should have acted in good faith and for the best interests of the owner; and in the absence of proof, it will be presumed that he did so act. It is in evidence that he has been reimbursed for the whole or greater portion of the amount so paid by the master, and defendant claims that, inasmuch as plaintiff has not shown the necessity of the hypothecation, he is entitled to recover from the plaintiff, the sums paid by the master. I am unacquainted with any principle of law that would support so unjust a conclusion.

3d. For money paid for port charges and in discharging the cargo, etc.

By the charter party and bill of lading the ship was bound to discharge the cargo and deliver it alongside and the amounts paid by plaintiff for this purpose, if reasonable, is a proper charge against the owner. It may have been the duty of the crew to discharge the cargo, but in the absence of all proof except that payments have been made for this labor, I cannot infer that they were unnecessarily made. The crew may have deserted or been discharged and others may have been employed, (which I believe is customary at this port,) to discharge the cargo.

The fairness or reasonableness of the charge is not impeached, and I must presume the consignee acted in good faith for the best interest of the owner, and is entitled to recover the amounts paid for discharging the cargo. The same remarks, in some respects, are applicable to the amounts claimed for port charges and for adjusting, and commissions for collecting the general average. These are proper charges against the ship and owner, and should be allowed.

A finding is ordered according to views herein indicated.

FULLER vs. HUTCHINGS.

Fourth District Court for San Francisco Co., Dec. T., 1857.

CHECK—DEMAND—GAMING.

By the law of this state a check payable at a particular place must be presented before action. If the holder, to whom it has been transferred, relies upon a demand and refusal of payment by the payee before the transfer, it is *prima facie* evidence that he received it after it was overdue and dishonored.

A party who buys a check after it is overdue and dishonored, receives it subject to all the equities that attach to it between the antecedent parties.

If a check be given solely for money lost at "faro," the consideration is illegal and it is void as between the original parties.

If before the trial notice be given that defendant will require plaintiff to prove the manner he received and the consideration he paid for the check, and defendant shows that the check was void as between the original parties, plaintiff must show that he paid value to entitle him to recover.

The facts are sufficiently stated in the opinion of the court, to illustrate the principles of law passed upon.

G. F. & W. H. Sharp, for plaintiff:

Cited: *Haight* v. *Joyce*, 2 *Cal.* 64; *Wood's Cal. Dig.* 472; *Chitty on Bills*, 104 *and* 105, and cases there cited; *Thorne* v. *Yontz*, 4 *Cal.* 321; *Palmer* v. *Goodwin*, 5 *Cal.* 458; *Vallet* v. *Parker*, 6 *Wend.* 615; *Story on Promissory Notes*, 645, § 491; 3 *Johns. Cas.* 5, 9; *Chitty on Bills*, (18 *ed.*) *ch.* 11 *p.* 546.

As to notice given to defendant, counsel cited: *Code* § 18, 19 and 517.

Cook & Fenner, for defendant:

Cited: *McKinnon* v. *Sanbury*, 23 *Ohio* 156; *Monroe* v. *Cooper*, 5 *Pick.* 412; *Holme* v. *Kaspar*, 5 *Binny* 469; *Duncan* v. *Scott*, 1 *Campb.* 100; *Beers* v. *Marquis of Headford*, 2 *ib.* 574; *Palmer* v. *Goodwin*, 5 *Cal.* 458; *Hay* v. *Earl of Coventry*, 3 *Term.* 82; *Woodhull* v. *Holmes*, 10 *John.* 241; *Bertrand* v. *Barkman*, 8 *English* (*Ark.*) 150; *Newslin* v. *Forward*, 5 *Ala.* 349; *Boyd* v. *McIvon*, 11 *Ala.* 825.

HAGER, J.—This action, tried before the court without a jury, is brought to recover the amount of a banker's check, drawn April 22d, 1857, by defendant *Hutchings*, in the firm name of *Sweetzer, Hutchings & Co.*, on *Tallant & Wilde*, bankers, for the sum of twenty-five hundred dollars, payable to *S. L. James* or bearer. *Hutchings* makes answer to the complaint, and in effect admits that he alone gave the check, and that *Sweetzer* resides in the state of Massachusetts and had no knowledge thereof, and sets up as a special defense that the check was given "for losses in bets on cards at a game of chance, prohibited by law," and is without consideration: that it was delivered to *Chapman*, who represented the parties with whom the bets were made and lost, and that plaintiff received it with full knowledge of the circumstances, and paid no consideration therefor.

By stipulation it is admitted that the check was given and delivered as alleged, for money lost at playing faro, which was the only consideration. It was also admitted on the trial that *Sweetzer* had no knowledge of the transaction, and that on the said 22d of September, *Chapman* presented the check for payment, which was refused.

It was proven that on the day before the trial, defendant gave a written notice requiring plaintiff to prove how he had received, and the consideration he had paid for the check. No evidence was introduced tending to show that plaintiff had ever demanded payment, or that any presentation or demand had been made other than the one made by *Chapman*.

Upon this state of facts, two questions are presented:

1st. Was the check over due or dishonored when it was received by the plaintiff; is the consideration inquirable into between the parties, and can defendants make the same defense against plaintiff as they could against the original holder, *Chapman?*

2d. Is the check void for want of a legal consideration?

The supreme court in the case of *Wild* v. *Van Valkenburg*, 7 *Cal. Jan. T.*, decided that in an action against the maker of a promissory note, it is necessary for the plaintiff to prove a demand of payment at the place specified in the note. The same rule must be applied to this instrument. It did not become due until after the demand by *Chapman*, and the refusal to pay. Now this is the only presentation relied

upon by plaintiff to recover, which was made on the day of the date of the check. If plaintiff was an innocent purchaser without notice, he might have made a legal demand on the day following, but from the fact that he neglected to do so, it is not unreasonable to suppose that he had knowledge of the demand, and refusal, which had already been made, and which he has put in proof, and he must be regarded as having received it after it had been dishonored and was over due.

It will not be disputed but that the consideration would be inquirable into for the purpose of defense if the action was between *Chapman* and defendant, and it is a well settled rule of law that if a party takes a bill even for value after it has been dishonored or is over due, he receives it subject to all the equities that attach to it between the antecedent parties. Then upon the proofs it results that the defendants can make the same defense against plaintiff that they would be entitled to make against *Chapman*.

The check having been given for money won at faro, under section three of the act of 1855, to suppress gaming, (*statutes of* 1855, *p.* 124,) it is declared "to be void and of no effect as between the parties thereto, and as to all other persons except such as shall hold or claim under them in good faith, and without notice of the illegality of the consideration." By the act of 1857, (*statutes of* 1857, *p.* 267,) which does not repeal the above provision of the act of 1855, it is made felony to deal, and a misdemeanor to bet at, the game of faro, and it is punishable by fine and imprisonment. Both these acts were in full force when the money was lost and won and the check was given; and if the evidence and admissions be true, *Chapman* and *Hutchings* have each rendered themselves amenable to their provisions. The plaintiff, for the reasons above stated, cannot be regarded as an innocent holder without notice within the meaning of the statute of 1855. Prior to the passage of either of the acts referred to, our supreme court held that a gaming debt was not recoverable, at common law, in this state. As between the immediate parties to the check the consideration is illegal, for the reason it is against the general principles of the common law, and because it is founded in the positive prohibition of a statute, and is *malum prohibitum*.

According to the ordinary rule, plaintiff would be presumed *prima*

facie to be a holder for a valuable consideration, and would not be bound to establish that he had given any value until the defendants had established the illegality of the consideration. But here, besides the fact that the check had been dishonored before the transfer, defendants gave a written notice to the plaintiff, that upon the trial he would be required to prove the consideration he had paid. The plaintiff having failed to introduce any proof, explaining the manner he received, or the value he paid for it, and the illegality of the consideration having been established, he cannot be considered a *bona fide* holder, either according to the principles of the common law or within the meaning of the statute of 1855.

Defendants are entitled to judgment. Finding ordered accordingly.

BENSLEY vs. MOUNTAIN LAKE WATER CO.

Fourth District Court for San Francisco Co., Dec. T., 1857.

ORDER OF COURT—LIS PENDENS.

Commissioners were appointed to value certain lands alleged to be necessary for the construction of defendants' works, and in their official capacity reported a parcel of land as necessary, and that a part thereof claimed by E. was worth $3,000; E. subsequently transferred the land to the plaintiff, and after the report of the commissioners was confirmed; *held* that the plaintiff who was not made a party to the motion for an order confirming the report, nor was charged with actual or constructive notice of the proceedings, is not bound by those proceedings.

Perhaps had a *lis pendens* been filed, the plaintiff might have been bound by a constructive notice.

An order entered subsequent to confirming the report which required the sheriff to put the defendant in possession of the land of E. when plaintiff was not a party to that order is of no validity to affect his rights and must be set aside.

An injunction to restrain the sheriff from putting defendants in possession under that proceeding, will be made perpetual under the above circumstances.

In this case a bill was filed for a writ of restitution to put plaintiff in possession of land taken by defendant. The court issued an injunction restraining both plaintiff and defendant, requiring them to cease proceeding otherwise in the matter until this cause is determined.

O. L. Shafter, for plaintiffs.

There are four questions:

First.—Did the defendants ever have the right to appropriate the private lands of plaintiffs on Lobos Creek, or the water adjoining that stream?

Second.—Conceding the right, have the defendants exercised it in the mode pointed out by law?

Third.—If they have so exercised it as against *Emerson*, under whom the plaintiffs claim, then are the plaintiffs bound by the appropriation?

Fourth.—And if bound in the first instance, have not their lands been discharged of the appropriation by matters subsequent?

(The second and third points only are passed upon by the court.)

Second.—Conceding the right, the company have not exercised it in the mode prescribed by law.

I. The order appointing the commissioners required them to meet in the city hall. (See order and statutes of 1851, 439, § 17.) It does not appear from the report that they met at that place; or where they met.

II. The order required the commissioners to meet on the 17th of June, 1853. (Statutes of 1851, 439, § 17.) It appears by the report that they met June 19th.

III. It does not appear by the report or otherwise that the commissioners were sworn. (Same sec.)

IV. It does not appear from the report that the commissioners viewed the premises. (Same sec.) Parol proof is inadmissible to supply this defect. 2 *Har.* (*N. J.*), 25; 2 *How.*, 341.

Third.—But conceding that the plaintiffs have succeeded in appropriating these lands as against *Emerson*, we insist that the appropriation is of no avail as against *Perkins & Bensley*, *bona fide* purchasers without notice. No *lis pendens* was filed. (Code § 27.) There is no evidence of any notice in fact.

T. C. Hambly, for defendants.

The statute of May 3d, 1852, (Statutes of 1852, 170,) authorizes

water companies to purchase, or take possession of, and use and hold, such lands as may be required, and directs that the mode of proceeding to obtain possession, shall be the same as described in §§ 17, 18, of an act to provide for the incorporation of railroads, passed April 28th, 1851. The act of 1851 directs the mode of proceeding to procure lands, and directs as follows: If the company are not in possession they shall proceed to assess in the form therein prescribed, subject to appeal to the supreme court; but that such appeal shall not prevent the company from taking possession of the land. Showing that it was not intended by the act that they should not take possession until the proceedings were completed, but might do so at any time, and retain the same. The statute then provides that upon the entry of the "rule" required, (all of which had been done in this case,) they may take possession of what they were not at the time in possession, and "hold and use" all described in the rule.

Therefore, if there be any irregularity or error, (which we deny,) in our proceedings, yet still the plaintiff cannot turn us out, but can only go on to reassess the damage. The same section provides that if, after an attempted or actual ascertainment of damages, it shall appear that the title is defective, or that it shall fail altogether, the corporation shall go on anew to assess; but if already in possession, as the defendant was in this instance, "shall continue in possession, and if not shall take possession, and use such premises during the pendency, and until the final hearing and conclusion of such proceedings, and the court may stay all actions or proceedings against such corporations on account thereof." How, then, can the plaintiffs expect to stay our occupation, or to prevent our taking possession, or to oust us if, as in this case, we had already entered. The plaintiffs admit, in their complaint, that we have obtained the "rule" which the act speaks of, and have paid the money, so that our proceedings are complete, so far as necessary to enable us to take possession, and to maintain it; and likewise the statute establishes clearly that if the plaintiffs have not had their rights passed upon, they cannot maintain this action, but must proceed under the statute to have a further assessment.

We have shown the largest equities, and allege that we have not done and cannot do the plaintiffs any injury, because they may, if not paid, yet claim the money in court, or ask a new assessment.

No delay would evidence an abandonment, but if it were unreasonable—under the statute, the plaintiffs can compel us to proceed, or dismiss our suit—which they have not done or attempted. No delay of payment would defeat our right, unless the other party (the claimant) proceed against us, in some mode known to the law, to compel us to elect; for the right to occupy does not arise from the payment; that is given by the statute before payment, and the only effect of payment is to annex the fee to our occupation. *Bloodgood* v. *H. R. R. R. Co.*, 2 *Railroad Cas.*, 415; *Savary* v. *N. R. R. Co.*, 8 *Watts & Searg.*, 463.

The court will not enjoin us from doing a lawful act. That which the plaintiff complains of is authorised by law, and therefore cannot be enjoined. They do not set out irreparable injury, for the reason that there is none—the law giving the plaintiffs the damages paid into court as a compensation for the injury they complain of. We have denied the whole equity of their bill, therefore their injunction must be set aside. *Crandall* v. *Woods*, 6 *Cal.* 449.

The decree under which we act is final, and the court will turn the parties over to their action of ejectment, if plaintiffs deem that we have no right to the land, (if they have any remedy outside the statute,) and if they seek to avoid it because of fraud, they must set out the fraud, so that the court may judge of it, and we may prepare to meet it; a broad allegation alone will not answer.

We have also shown that both *Bensley* and *Perkins* had actual notice of these proceedings. The action of the company in proceeding to condemn, affects no one's rights who is not a party to the proceeding, so far as a claim for damages may go; but it will neither keep the company out of possession, nor turn them out if they have taken possetsion; their right to the land, or water, or both, as the case may be, is complete; but the claimant has also his or her right—not to the possession or retention of the land or water—but to such damages as they may be entitled. The proceeding is in fact in the nature of a proceeding *in rem*; it goes against the land itself, and the claimant cannot hold the land, he can only obtain payment for his right. He could not, and cannot now, resist our taking the land, though he may raise his damages as high as he can. If the plaintiff could succeed in

setting these proceedings all aside, still we could immediately renew our petition, and proceed again to have the damages assessed, and in the meanwhile *take, hold, and use the land.*

Plaintiffs cannot take advantage of any supposed defect in the proceedings, occasioned by the commissioners not having met in the city hall, (supposing it necessary for them to have done so, and we see nothing in the statute of 1851, § 17, to authorise the conclusion.) If they were not parties, and had no notice, they are not bound by the proceedings or the assessment—then they can have a new one, and it is perfectly immaterial to them where the commissioners met; they cannot meddle with a proceeding to which they were not parties. Our *right* to the *land* was *vested* three years ago. *Kelly* v. *Natoma Water Co.*, 6 *Cal.*, 105.

O. L. Shafter, for plaintiffs, in reply.

I. There is no evidence that any survey was made by the company in 1853, and if such survey had been made it would not of itself have determined and fixed the scope of the corporate objects; that could be done by the certificate alone.

II. It is insisted that the company is entitled to the present possession of the land, even though the proceedings before the commissioners were *fatally* irregular. This is contending, in effect, that private lands can be taken without any proceedings whatever. But the act of 1851, § 17, makes proceedings and payment, or deposit of damages, a condition precedent to a right of entry.

III. It is said that the commissioners have reported that the lands in question are necessary, &c., and that the finding is conclusive. The answer is, that the powers of the commissioners are limited in the matter of condemning the lands of plaintiffs; they acted upon a subject matter that was foreign to the chartered objects of the company. 2 *How.*, 341. The protracted neglect of the company to take any steps to consummate its title to the land in question, shows an intention to abandon—an abandonment in fact.

IV. Although the report was *confirmed* in September, 1853, yet no payment of damages, or deposit of damages, was made until June 29th, 1857, a period of almost four years; nor was "a rule describing

the land," entered until the 25th of September, 1856. These delays operated as an abandonment of the proceedings as to the plaintiffs. 10 *Johns*, 130.

HAGER, J.—By the pleadings and proof submitted it appears that on the 24th of June, 1853, upon the application of the defendants, commissioners were appointed by this court to value certain lands, alleged to be necessary for the construction and maintenance of defendants' works, which were owned, or claimed, by certain parties named in defendants' petition, among whom were *Vincent* and *Emmerson*.

On the 23d of July, 1853, the commissioners made and filed their report, in which they represent that the whole of the lands—containing 343 acres—mentioned in the petition, and which is embraced in one description, is required for the use of said company; that those embraced in the claim of *Vincent* are worth $9,000, those in that of *Emmerson*, $3,000, and the remaining portion is worth $10 per acre.

On the 17th of December, 1853, it appears by the record that a motion was made in the matter of the *Mountain Lake Water Co.* v. *Vincent*, to set aside some order theretofore granted, and that, on filing a bond, the clerk should cancel and deliver up all securities theretofore taken for the sum of $12,240, the value of the lands appraised under § 28, etc., which motion was granted by a written order, now of record, wherein it is recited that: "it appeared to the court that no rule had been asked for or entered on behalf of said *Mountain Lake Water Co.*, describing the lands so to be taken possession of by said company, and that no proceedings subsequent to the report of the appraisers had been made or asked for by said company;" and, further, that "it appeared to the court that the said *Mountain Lake Water Co.* did not further proceed to obtain possession of said lands under the provisions of said statutes."

On the 22d of October, 1853, *Emmerson* sold and conveyed the said lands claimed by him to plaintiff, *Perkins*, and on the 16th day of May, 1854, *Perkins* sold and conveyed an undivided half part to plaintiff, *Bensley*.

On the 25th September, 1856, an *ex parte* order—it not appearing

that notice of the motion was given to either *Emmerson*, *Perkins*, or *Bensley*, was made on the application of defendants herein, confirming the report of the commissioners filed in July, 1853, as above stated: and on the 29th of June, 1857, on motion of defendants, and without notice, a further order was made that the sheriff put the defendant in possession of the said land claimed by said *Emmerson*. At the time this order was made the lands were owned and possessed by the plaintiffs, who were not parties to the proceedings had against *Emmerson*, *Vincent*, and others. Nor were they charged with actual or constructive notice of the proceedings. If defendants had put on record a *lis pendens*, as provided in our code, plaintiffs, perhaps, would have been affected with notice, in which case it might be important and necessary to consider the order of December 17, 1853.

As the case now stands it may be doubtful whether the proceedings before the commissioners, and the confirmation of their report, are binding upon the plaintiffs; but as to the order of June 29, 1857, it could only operate against *Emmerson*.

Plaintiffs were not parties to that order, or the proceedigs anterior to it, and it is of no validity to affect their rights, or to deprive them of the title or possession of their property. Under it defendants had no authority to dispossess the plaintiffs, or any person except *Emmerson*.

The order of June 29 must be vacated and set aside, so far as it affects or is a cloud upon the title or possession of plaintiffs to the land in question, and defendants must be perpetually enjoined from further proceedings under it against plaintiffs, or any person claiming or pretending to claim under them; to this extent the injunction heretofore granted is modified.

The injunction against plaintiffs is dissolved.

I deem it unnecessary to define or pass upon the respective private or corporate rights of the parties, or to attempt to decide upon the sources of supply to the Mountain Lake or Lobos Creek.

The defendants may perhaps have inchoate or absolute rights to all the waters in controversy, and although much testimony has been introduced upon these controverted questions, upon reflection I am satisfied they cannot be determined in this action. They may be the subject matter of another suit.

The section of the act (§ 17 of the railroad act of 1851) under which defendants have heretofore proceeded to obtain the land, provides a remedy which, I think, perhaps is intended to meet cases like this, by authorising further proceedings to obtain the land in controversy; after the purchase of the land by the plaintiffs, defendants should have resorted to that remedy.

Decree ordered accordingly.

PARKS vs. ALTA TELEGRAPH COMPANY.

Sixth District Court, for Sacramento Co., Feb. T., 1858.

TELEGRAPH COMPANIES—CONTRACT—DAMAGES.

On the 7th of Oct. A. received a telegraphic message from B., his agent, informing him that C. had failed. At 7 o'clock P. M., same day, A. gave a telegraph company the following message: "Due $1,800; attach if you can find property; will send note by to-morrow's stage." The message was not sent, of which A. was not informed until 9 o'clock A. M., on the 8th, when he caused it to be transmitted. B. received it at 12 M., commenced an action at 1 P. M., and gave the sheriff a writ of attachment at 6 P. M. Recovered judgment, issued execution, returned *nulla bona*. Upon writs of attachment issued by other creditors of C., about 3 P. M. on the 8th, $2,000 was realized. Other creditors of C., who issued writs of attachment on the 6th, recovered nothing. A. brought an action against the telegraph company for $1,800 damages.

Held, that it was gross negligence not to have informed A. until 9 A. M., of the 8th, of the non-transmission of his message; but that no certain damages had been proven. Had damages been proven defendants would have been liable.

Tried by the court, a jury having been waived. The requisite facts are set forth in the opinion.

G. Cadwallader, for plaintiff.

Hartly & Carter, for defendant.

BOTTS, J.—On the 7th day of October, 1856, about 7 o'clock, P. M., the defendant contracted with the plaintiff, at Mokelumne Hill, for the immediate despatch of a message to the city of Stockton. The

despatch was directed to the agent of the plaintiff, in Stockton, and was in these words:

"Due $1,800; attach if you can find property; will send note by to-morrow's stage."

This was in answer to a despatch by the same line, received that morning from his agent, informing the plaintiff of the failure of *Gillingham & Co.*, and inquiring the amount due from them to plaintiff. An accident prevented the transmission of the message, of which the plaintiff was not informed until 9 A. M. on the 8th. He was then asked if he still desired to have the message transmitted; and on his answering in the affirmative, the despatch was forwarded, and was received by the agent of plaintiff five minutes before 12 M. The plaintiff's agent commenced suit against *Gillingham & Co.*, about 1 P. M., but the writ of attachment was not delivered to the sheriff until 6 P. M. In this suit the plaintiff recovered judgment, and there was a return of *nulla bona* on the execution. The firm of *Gillingham & Co.* is notoriously insolvent. One of the firm is now conducting a commission business in Stockton, in his own name, and on his own account. Upon attachments levied at the suit of other creditors of *Gillingham & Co.*, about 3 P. M., of the 8th, the sum of $2,000 was realized.

Upon these facts the plaintiff claims damages of the defendant in the sum of $1,800.

That the failure to inform the plaintiff of the impossibility of transmitting his despatch was an act of gross negligence, there can be no doubt. The question is, has the plaintiff sustained damages for which an action will lie against the defendant?—and this brings us to the consideration of that very mooted question of the line between proximate and remote damages. The ability and learning with which this case has been argued, does great credit to the counsel on both sides, and they have done much to lighten the labors of the court. It is desirable that the lines drawn by the law should be as sharp and clearly defined as possible; but this is one of those subjects in which the shades are so blended that it is difficult always to distinguish the one from the other; just as, in the revolution of the earth, it is impossible to say at what moment day ends and night begins.

Under the old common law system damages were divided into two

classes: the first, the immediate and inevitable consequence of the wrongful act; the second, where the damage was the necessary consequence of the act, under the peculiar circumstances of the case. The first was the foundation of the action of trespass; the second, of trespass on the case. We substantially preserve the same distinction under the names of "general" and "special" damages. Even when the damages were not the universal, but the peculiar result of the unlawful act, the ancient rule required that they should be distinctly traceable to this source, unalloyed by confluent streams, whose effect in swelling the volume it was impossible to estimate; and this, I take it, is the law of the present day.

There are, then, three things necessary to the recovery of the damages: they must have been certainly sustained; they must be capable of measurement; and they must bear to the act complained of the indubitable relation of cause and effect. In the application of rules so metaphysical as these, incongruities, numerous as the various intellects through which they are distilled, will necessarily occur. It is impossible to reconcile the cases; one mind conceives that the necessary consequence of an act which another distributes amongst a variety of concurring causes. Acts of omission always present greater difficulty than acts of commission. It is the object of the law to restore the injured party to all the rights of which he has been deprived by the wrongful act; but it is always more or less a matter of speculation to determine what would have been the condition of the plaintiff had the omitted act been performed; and this, I think, presents the greatest difficulty in the case at bar. The plaintiff's right of action, if any, arose upon the failure of the defendant to transmit, in a reasonable time, say thirty minutes, his despatch to Stockton. Now, supposing the message duly forwarded, it is the imagination, not the judgment, that is called into requisition to determine the result. Would the agent have attached in time? Would he be able to give the bond? Would he find property upon which to levy? These are questions to be solved at thirty minutes past seven, upon the evening of the 7th day of October, 1856, when the cause of action arose. It was at that moment, and by the then existing state of things, that the principle involved in this case is to be determined. Was the securing the plaintiff's debt the inevitable

result of the transmission of the message? Was the failure the necessary cause of its loss? Were these consequences—the securing the debt, on the one hand, its loss upon the other—so necessarily the result of the acts of commission and omission, as that they may be supposed to be in the minds of the contracting parties, and to have been impliedly included in their agreement? Suppose this message could have been transmitted only at an expense of $500; does anybody believe plaintiff would have paid it? And why not? Because the uncertainty of advantage from it was too dubious; and even as matters stood on the next morning, when the plaintiff was informed that the message had not been transmitted, the amount of injury sustained was involved to that degree, in doubt and uncertainty, that it could only be determined by suppositions and speculations, to which the law refuses to subject the rights of property.

There are difficulties in this case, even if we consider those things that occurred after the right of action accrued, for the purpose of removing the cloud that rests upon it. There was only the sum of $2,000 realized from attachments levied after the time when the plaintiff's agent could possibly have attached, had the message been duly transmitted; and this was the result of superior vigilance in the attaching creditor, who discovered property that had escaped the notice of creditors attaching on the 6th. It is not, therefore, always the earliest bird that catches the worm. Who is to determine whether the agent of the plaintiff would have been as diligent as the creditor of the 8th, or as unfortunate as the attaching creditors of the 6th?

I have been referred to a great many cases, by plaintiff's counsel, in which courts have undoubtedly crossed the line between certainty and speculation, and I am far from saying that the rule, in its literal strictness, should always be adhered to; but this I can say, that no case has been exhibited to me where any court of established reputation has indulged in such a series of speculations as would be necessary to arrive at the actual injury resulting to the plaintiff from the negligence of the defendant. It is true that anticipated profits have sometimes entered into the estimate of damages for the non delivery of goods, both by vendors and common carriers; and it might be, and has been urged, that this estimate involves more or less of speculation. This

question always occurs: would the vendee necessarily have availed himself of the top of the market? In *New York*, and in *England*, too this is still, to some extent, a mooted question; but even where this element has been permitted to enter into the estimate of damages, it is believed that a careful examination will show that it has been confined to those cases where the article purchased, or to be delivered, was known to both parties to be intended for immediate sale in a specified market. In the celebrated marble case, reported in 7 *Hill*, *Masterton* v. *Mayor*, *&c.*, *of Brooklyn*, (7 *Hill*, 61,) judge *Nelson* ruled out any testimony of particular contracts made by plaintiff, from which he sought to establish extraordinary profits; the court holding that he could recover only that amount which, in the usual course of trade, he would have necessarily netted from his contract with the defendants.

Much has been said, in the argument of this cause, about the public character of the defendant, its monopoly, its privileges, and the policy of holding it, like common carriers, to the strictest accountability. I know of no difference between common carriers and other contractors, except that, as a matter of convenience, an implied assurance of the goods transported is annexed to their contract of transportation; but this in no manner affects the measure of damages for breach of contract. In no sense can he who contracts to deliver a message be an insurer; a message has no market value to be insured; but he who contracts to deliver a message, or to do anything else, is responsible for all the clearly ascertained actual damage resulting from his breach of contract. The world has flattered itself that it has found a new and useful servant in the telegraph; but I apprehend but little capital would be invested in its establishment, if its founders were to be made pecuniarily responsible for all the damage that may be remotely traced to the imperfect or defective transmission of the mysterious messages with which they are charged. By the rule the plaintiff would have us to adopt, an error in transmitting, or a failure to transmit, the single word "attach," might involve the company in total ruin.

It is possible—nay, more, it is probable that, from the negligence of the defendant, the plaintiff has lost his whole debt; but an action for damages must rest upon a basis more certain than that of possible, or even of probable injury.

There is one loss sustained by the plaintiff, and only one, that I can weigh in the scales of justice; and that is, the consideration paid for the transmission of his message.

Let judgment be entered for the plaintiff in the sum of two dollars and fifty cents.

INCHES vs. VAN VALKENBURGH.

Fourth District Court for San Francisco Co., Feb. T., 1858.

PLEADING — COUNTS — MOTION TO STRIKE OUT.

Where a plaintiff sets out in his complaint four counts which appear to be substantially for the same cause of action, the court may, in its discretion, compel him to redraft his complaint, or to elect upon which count he will rely upon the trial.

The material facts are sufficiently given in the opinion. On motion to compel plaintiff to elect upon which count of his complaint he would rely.

Rabe and *Willson*, for plaintiff.

H. S. Love, for defendant.

HAGER, J.—The complaint contains four counts, and this motion is made to compel the plaintiff to elect upon which of them he intends to rely, and that the others be stricken out.

Upon reading the complaint, each count of which seems to me to be unnecessarily prolix, it appears the action is brought to recover rent claimed to be due upon, or owing by reason of a lease of certain land described therein. The different counts substantially set forth the same cause of action. The same premises are referred to in each of the counts, and in the first and third, and in the second and fourth, the same sums are mentioned as the amounts due, and for which judgments are asked.

All forms of pleadings except those prescribed by law, are abolished in this state, and the sufficiency of this complaint must be determined by our *code*.

Nothing is more clear than that the legislature intended to abolish the old common law system of pleading, which prevailed in most of the states, and in place thereof, to require a statement of the facts constituting the cause of action or new matter of defence, in ordinary and concise language, that a party sued might, if so disposed, without the assistance of a lawyer, know and be informed of the object of the action. This intention, and the rules of pleading established in this state, have been lost sight of by the pleader in drawing this complaint, and in my opinion the defendant ought not to be compelled to answer and defend four causes of action, when in fact but one exists.

If the plaintiff had simply given a statement of the facts constituting the cause of action, the narrative portion of the complaint would probably not have necessarily extended beyond the first page as written. In its present form, it contains four counts, covering nine pages compactly written, and if under our system of pleading it is good in the shape presented, then it would also be good if the counts had been doubled.

It is in the power of the court to strike out irrelevant or redundant matter, and I think this is a case where it should be exercised.

The plaintiff may redraft his complaint, or he must elect and give defendant notice upon which count he intends to proceed to trial, and defendant is allowed five days thereafter to answer.

HOWARD vs. MANDELBAUM.

Sixth District Court for Sacramento Co., Feb. T., 1858.

EJECTMENT—ESTOPPEL—EQUITABLE TITLE—PRIORITY.

A deed from A. to B.—when the former had, prior to the execution thereof, executed another to C., although the said deed to B. was made in pursuance of a contract to sell, entered into between A. and B., prior to the execution of said deed from A. to C.—will be treated as a nullity in an action of ejectment brought by B. against D. the assignee of C., because A. had, prior to the execution of the deed to B., parted with his whole estate in the land to C.

In such an action plaintiff would not be *estopped* from averring that the deed from C. to D. was not a conveyance in *fee*, by reason of the fact that A. had, in other deeds executed by him, subsequent to his conveyance to C., recited it as such—such reci-

tal being nothing more than his construction of the deed after he had parted with all interest in the land.

In the above case B. was in the notorious possession of the land, at the time of the conveyance from A. to C., but when C. sold to D. all traces of B.'s possession had been obliterated.

Held, that D. having bought without notice of B.'s equity, received the land free from the taint attached to C.'s title, and that of the two equitable titles, B.'s, being the oldest, would prevail but for the fact of D.'s possession, which gave him the better title.

This was an action of ejectment, tried before a jury, who returned a special verdict. The requisite facts are fully reported in the opinion.

R. F. Morrison, for plaintiff.

Latham & Sunderland, for defendant.

BOTTS, J.—This is an action of ejectment, in which both plaintiff and defendant claim through *John A. Sutter*.

On the 2d day of January, 1850, *Sutter* put the plaintiff in possession of the premises in dispute, and executed a bond to him for the conveyance of the title, upon the performance of certain conditions therein expressed. On the 20th day of April, 1855, *Sutter* conveyed to the plaintiff, in pursuance of the obligation in his bond. Including the *mesne* conveyances, thus stands the title of the plaintiff.

The defendant shows that, on the 7th of May, 1850, *John A. Sutter* conveyed the premises in controversy to *John A. Sutter, Jr.* The special verdict in this case establishes the fact that on that day the plaintiff was in the notorious possession of the property. On the 20th day of June, 1850, *John A. Sutter, Jr.*, executed a document to *Brannan, Bruce, Wetzler*, and *Graham*, which has been construed by the supreme court, *Mesick* v. *Sunderland*, (6 *Cal.*, 297,) to be a bond for the conveyance of title upon the performance of certain conditions precedent. It is admitted that the premises in controversy are included in this bond, and that the conditions have been performed. The defendant, by *mesne* conveyances, traces to *Brannan, Bruce, Wetzler*, and *Graham*. It is admitted that when the defendant purchased, all marks of the former possession of the plaintiff had been obliterated, and that when *John A. Sutter* conveyed to the plaintiff, the defendant was

in the notorious possession of the premises. It appears, also, that prior to the date of the deed from *Sutter, Sen.*, to the plaintiff, he, *Sutter*, had executed a deed, in which he recited the fact that he had previously conveyed to *Sutter, Jr.*, and that *Sutter, Jr.*, had conveyed in fee to *Brannan, Bruce, Wetzler*, and *Graham*.

In deciding the law in this case I treat as a nullity the conveyance of *Sutter, Sen.*, to the plaintiff, and the recital in *Sutter's* deed of —— 1852. The deed of *Sutter* to the plaintiff conveyed no title, because *Sutter* had previously conveyed the legal estate to *Sutter, Jr.* It is true that parties are *estopped* from denying facts which they have solemnly admitted, when, by those admissions, they have induced others to acquire rights dependant upon the admitted facts; and it is true that privies in estate are equally bound by such admissions. This, I take it, is the doctrine of *estoppel*. Now it is pretended that the plaintiff is *estopped* from denying that the instrument from *Sutter, Jr.*, to *Brannan, Bruce, Wetzler*, and *Graham*, is a conveyance in *fee*, because *Sutter, Sen.*, in one of the many deeds made by him, has described it as such. To enable the defendant to set up his admission as an *estoppel*, he would have to show that *Sutter* made such admission whilst he was owner of the property, and that, as against him, it would be inequitable to permit *Sutter* or his assignees to deny it. But, by its very terms, it appears that this recital was made after *Sutter* had parted with his whole interest in the premises; consequently this recital is nothing more than *Sutter's* construction of the instrument from *Sutter, Jr.*, to *Brannan, Bruce, Wetzler*, and *Graham*, and is not to be put in competition with the opinion of the supreme court, as expressed in *Mesick* v. *Sunderland*, (6 *Cal.*, 297.) I reject the recital for the same reason that I reject the deeds from *Sutter, Sen.*, to the plaintiff, because they were made when *Sutter* had no interest in the property. Then it comes to this, that the plaintiff and defendant both stand upon their equitable titles; the plaintiff upon his equity, derived from *Sutter, Sen.;* the defendant upon his equity, derived from *Sutter, Jr.* The equity of the plaintiff is prior in time to that of the defendant; and of this equity *Sutter, Jr*,, was notified, when he purchased, by the notorious possession of the plaintiff; but the marks of this possession having been obliterated, it was, upon the authority of *Ellis* v.

Janes, (7 *Cal.*, *April T.*,) no notice to the defendant; and the taint attaching to *Sutter*, *Jr.*, is purged by the innocence of the defendant. Between two equities, equal in every other respect, the elder must prevail—*qui prior est in tempore*, *potior est in jure*. But into the scale of the defendant must be thrown the fact of possession, which turns the balance in his favor; for the rule is, "*In equali jure*, *melior est conditio possidentis*."

Let judgment be entered for the defendant.

SCHLOSS vs. BLUM.

Fourth District Court for San Francisco Co., Feb. T., 1858.

DEMURRER—COMPLAINT ON PARTNERSHIP NOTE.

The complaint in an action on a promissory note in the title of which defendants are described as "doing business under the firm name of '*A. & B.*'" and which then contains the usual allegations as to the execution and ownership of the note—the indebtedness of defendants to plaintiff—and which sets out the note signed with the firm name "*A. & B.*", but which contains no *allegation* that defendants are co-partners under the firm name other than that contained in the title—will be held sufficient upon demurrer.

This is an action brought upon a promissory note signed "*Blum & Wertheimer.*" The complaint is entitled "*Philip Schloss* v. *Leopold Blum* and *Leopold Wertheimer*, doing business under the firm name and style of '*Blum & Wertheimer.*'" It then alleges the execution of the note for a valuable consideration, the ownership by plaintiffs, the demand by them upon maturity at the place specified in the note, the failure of defendants to pay it, and the fact that the debt is due and payable. There is no allegation in the body of the complaint that defendants are copartners doing business under the firm name of "*Blum & Wertheimer*," or that they as a firm executed the note in question.

Defendants demur upon the ground that the complaint does not set forth facts sufficient to constitute a cause of action.

Williams & Haights, for plaintiff.

Sidney V. Smith, for defendants.

HAGER, J.—The complaint is demurred to on the ground that it does not state facts sufficient to constitute a cause of action. In support of the demurrer defendants argue that inasmuch as the note described in the complaint is signed "*Blum & Wertheimer*," and there being no allegation that the makers are partners—plaintiffs cannot recover against them if all the facts are admitted. Upon inspection it appears that the title of the action as contained in the complaint describes the defendants as doing business under the firm name and style of "*Blum & Wertheimer*," and under § 29 of our *code* of practice, the title of the cause is a part of the complaint. The complaint also alleges that "the defendants" are the makers of the note, and this allegation must be construed to mean the defendants as described above in the title of the action. In my opinion the statement of facts as contained in the complaint is sufficient, and defendants are fully informed of the object of the action, which is all that is required under our system of pleading.

Demurrer overruled with leave to answer in five days upon payment of costs.

URY, ET AL. VS. REEDESDALE.

Third District Court for Alameda Co., Jan. T. 1858.

EVIDENCE—BOOKS OF ACCOUNT.

Books kept by a party himself may be admitted as evidence of the sale and delivery of the goods entered therein, provided the parties have the reputation of being honest dealers, and of keeping correct books, and the books themselves appear to have been fairly kept—free from erasures or alterations—and the party keeping the books testifies that the entries were made contemporaneously with the transactions to which they refer, and that the transactions took place as set out in the books.

This action was instituted by plaintiffs to recover their account as butchers.

The defendant denied the account, and also relied upon payment. The cause was tried before a jury. Upon the trial the plaintiffs offered their book account in evidence, and for that purpose they proved that

they had the reputation of being honest dealers, and of keeping correct books. They also proved by one member of the firm that he was their salesman and bookkeeper; that three books were kept; one by each customer, in which was entered, by the salesman, the quantity of meat sold, and its price; one by the salesman, in which similar entries were made, and a third, their shop book, in which the salesman transcribed from his sales book the sales he had made on that day. This latter book was their regular day-book, in which the accounts of their ordinary business transactions were kept. He further stated that the sales were made as specified therein, and that the amount against the defendant was correct, and which had not been paid. The day-book was then submitted to the court for its inspection, which appears to be the register of the daily sales of the plaintiffs, and to have been fairly kept—free from erasures or alterations.

The defendant objected to the introduction of the plaintiffs' day-book as evidence.

J. Lent, for plaintiffs.

H. W. K. Clark, for defendants.

HESTER, J.—Entries made by the party himself, in his own shop books, under the circumstances of this case, contemporaneous with the sales, are a part of the *res gestæ*, and admissible in evidence. The objection is therefore overruled, and the day-book admitted in evidence. 1 *Greenl. on Ev.*, § 118, *notes* (1) & (2,) and authorities there cited.

The jury found for the plaintiffs.

PEOPLE EX REL. CHEEVER VS. MICKLE.

Fourth District Court for San Francisco Co., Feb. T., 1858.

PUBLIC OFFICERS — SALARY.

In 1850 a law was passed creating the office of dockmasters, and providing for the payment of their salaries. In March, 1857, a law was passed abolishing the office, but

continuing the then incumbents in office, until January, 1858. In April, 1857, the law providing for the payment of the dockmasters was repealed—no provision being made for the then incumbents. The latter continued to discharge the duties of the office until January 1st, 1858. The auditor refusing to audit their claim for salary, they brought suit for a peremptory *mandamus*, to compel him to do so. *Held*, that there was no law making it the duty of the auditor to audit their claims —*mandamus* refused.

On rule to show cause why a peremptory *mandamus* should not issue. The requisite facts are fully stated in the opinion.

Fabens, for plaintiff.

Tracy, for defendant.

HAGER, J.—I can find no law authorising the payment of the salaries claimed to be due from the city and county of San Francisco, o the plaintiffs as dockmasters.

It is true, by the act of 1857, they were continued as legal officers until the first of January 1858, when, according to the provisions of existing laws, one harbor master is substituted in their place ; but by the subsequent act of April 18th, 1857, the law fixing and authorising the payment of their salary, was repealed—this was conceded on argument.

There is much confusion and conflict in the various statutes relating to dock and harbor masters, and although plaintiffs ought to be compensated for the services they have performed by authority of law, yet I am unable to discover any existing law fixing the amount of their salary, or that will authorise the auditor to allow or audit their claim for any particular sum.

In other words, the auditor has not refused to perform a duty enjoined upon him by law, in declining to allow or audit plaintiffs' claim.

The motion to make the writ peremptory must, therefore, be denied.

DICKINSON ET UX. VS. POLHEMUS.

Fourth District Court for San Francisco Co., Feb. T., 1858.

INJUNCTION — HOMESTEAD — WRIT OF ASSISTANCE.

An injunction restraining the execution of a writ of assistance after sale under foreclosure of certain mortgaged real estate, upon the ground that plaintiff has a homestead in the premises, will, if it appears that the premises in question embrace a greater tract than plaintiff could possibly claim as homestead, be so modified as to restrain the sale of only such portion of the premises as plaintiff can legitimately claim as homestead, provided such portion can be ascertained from the pleadings and the proofs adduced upon a motion to dissolve the injunction,—but if it cannot be ascertained to what portion of the premises plaintiff may be entitled to assert such a claim, then the injunction will be dissolved as to the whole.

Whether or not an injunction ought to be issued at all, *quære?*

Action brought to obtain an injunction restraining defendants *Polhemus* and *Bissell* from any and all interference with a certain fifty vara lot claimed by plaintiffs as their homestead,—from taking possession or collecting and receiving the rents and profits thereof—and to restrain defendant *Doane*, sheriff of the city and county of San Francisco, from executing a writ of assistance issued to put defendants in possession of the premises in controversy—and to obtain a decree declaring that the premises are plaintiffs' homestead, and that a certain sale thereof, heretofore made by the said sheriff, and a deed executed by him in pursuance of said sale, be declared void. A temporary injunction was issued.

On motion to dissolve the same. The requisite facts are fully given in the opinion.

Shafters, Park & Heydenfeldt, and *R. P. Clement*, for plaintiffs.

Janes, Lake & Boyd, for defendants.

HAGER, J.—Plaintiffs, husband and wife, filed their complaint to obtain an injunction against defendants to restrain them from taking possession of certain real estate described in the complaint, under a foreclosure of a mortgage made by the husband alone, and a sale

thereon, on the ground, as is alleged, the premises are the wife's homestead, and exempt from sale, &c.

Upon the complaint a temporary injunction was ordered. Upon the showing and facts disclosed upon this argument, I am of the opinion the plaintiffs are not entitled to the relief asked, and the injunction should be dissolved. Perhaps plaintiffs may be entitled to some relief, and to an injunction in a modified form, but their case is not so presented as to enable me to extend it to them in this action upon their complaint.

The property which defendants threaten to take possession of,—which the injunction operates to prevent—is described in the complaint as a fifty vara lot situated in a rather central portion of the city. By defendants' showing, which is not denied, it appears to be worth at least $15,000, and contains some twenty different tenements, occupied by about the same number of families.

A homestead cannot exceed in value $5,000, and whether or not plaintiffs or either of them have a homestead on the premises, it is certain the entire lot was not protected from conveyance and sale on the ground of its being a homestead.

By the complaint the homestead is not defined or described by boundaries, except that the whole lot is claimed, nor is the value of it given; nor does it appear that any portion of the lot has been dedicated to the purposes of a homestead. The injunction prevents the defendant from taking possession of the whole as well as any portion of the lot, and the complaint asks relief in this form. Now if it appeared by the complaint that plaintiffs claimed a homestead, such as the law authorises, in any particular portion of the lot, or in any one of the particular tenements, I might order a modified injunction so as to restrain the action of defendants as to that particular portion, but in the absence of all allegations as to what constitutes the homestead, except the fifty vara lot, and with the defendants' *prima facie* case that it is not a homestead within the meaning of the statute, I am unable to decree this modified relief.

Besides, I might say, it is not clear that an injunction will be of any particular benefit to plaintiffs, or that they can sustain irreparable injury if defendants execute their threats and take possession.

If the wife has homestead rights, the foreclosure and sale cannot divest them, if she was not made a party, and if not a party the writ of assistance cannot run against her. If she is unlawfully interfered with in her title and possession, she has her right of action for redress and it is unnecessary for a court of equity to interfere.

It would be manifestly unjust to restrain defendants from proceeding against the whole lot; and as plaintiffs have asked greater relief than they are entitled to, and I am unable from any facts before me to determine what, if any, rights of the wife will be jeopardised by anything defendants threaten to do, this injunction must be dissolved. The complaint at least ought definitely to show that the wife has such a homestead as is recognised by the laws of this state, and a particular description of it should be given.

The injunction must be dissolved.

PIERCE vs. ROBINSON, Adm.

Sixth District Court for Sacramento Co., Feb. T., 1858.

COLLATERAL SECURITY—LIEN OF BILL HOLDER.

Where the drawee of a bill of exchange accepts it upon the faith of collateral security, deposited by the drawer, the holder of the bill has no lien upon the security simply as bill holder, but he may have a lien by effect of an equity between the drawer and drawee.

A. being involved conveyed real estate to B. with a secret trust that B. should pay certain debts of A.'s, and reimburse himself out of the profits of the real estate. A. drew a draft upon B. in favor of C., one of the creditors, which draft B. accepted. B. died, leaving less assets than debts.

Held, that C. had no lien upon the profits of the real estate, to secure the payment of his claim, in preference to those of other creditors.

The material facts are sufficiently reported in the opinion.

Winans & Hyer, for plaintiff.

Clark & Gass, for defendant.

Botts, J.—In this case I find, as matter of fact, that on the 13th

day of September, 1854, *Hutchinson & Greene*, being largely indebted to the said *Frierson*, deceased, did convey and deliver to him, the said *Frierson*, a large amount of personal property, consisting of farming implements, hay, grain, etc., upon a farm in the county of *Yolo*, which farm had been previously conveyed by the said *Hutchinson & Greene* to the said *Frierson;* that the conveyance of the land and the sale of the personal property, although absolute in terms, were, in reality, upon trust; that the trusts were concealed, for the purpose of hindering and delaying the creditors of *Hutchinson & Greene;* that the secret terms, both of the conveyance of the real estate and of the personal property, were, that *Frierson* should advance a further sum, sufficient to pay off the debts due the hands who had been working on the farm, amongst whom the plaintiff was enumerated, and to whom there was then due the sum of nine hundred and eight dollars and ninety-six cents ($908 96); that the said *Frierson* was to carry on the business of the said farm, and to make the necessary advances for the conduct of the same; that out of the proceeds he was to reimburse himself for the amount due him from *Hutchinson & Greene* on the said 13th of September, 1854, and for the future advances to be made under this agreement; that the plaintiff was informed of the nature and character of the secret trust; that *Frierson* paid off the debts due the hands, and other creditors of *Hutchinson & Greene*, to the amount of some ten thousand dollars; that the plaintiff agreed to wait for his money, and, accordingly, *Hutchinson & Greene* drew a draft upon *Frierson*, in favor of the plaintiff, at three months, for the said sum of $908 96; that the said draft was duly accepted by the said *Frierson;* that said draft was not paid at maturity, but still remains due and unpaid; that of the dishonor of the draft no notice was given to the drawers; that the plaintiff and his wife continued to work upon said ranch up to the 26th of February, 1855, when the bill for their united services amounted to the additional sum of $789 25; that during this period, to wit., from the 13th of September, 1854, to the 26th day of February, 1855, the business of the farm was conducted in *Frierson's* name, and that the plaintiff procured from *Frierson's* agent a certificate that he and his wife had worked on "*Frierson's Ranch*," and that the bill for their services, so rendered, amounted to $789 25; that the

plaintiffs account against *Frierson's* estate, for the amount of the draft, and the said sum of $789 25, with the accruing interest, was duly presented to the administrator of *Frierson's* estate, and by him allowed to be paid, *pro rata*, out of the assets of the estate; that, under the supervision and with the approbation of the probate court, from which his letters of administration issued, the administrator settled the trust account with *Hutchinson & Greene*. It is admitted that the produce of the farm was more than sufficient to pay all the expenses of its management, and the debt due the plaintiff; and it further appears that the administrator has now in his hands a sum more than sufficient to pay the plaintiff's claim, the identical proceeds of these crops.

Upon these facts it is claimed that the plaintiff has a specific lien upon the proceeds of the farm, now in the hands of the administrator: and this upon the principle that the creditor has an equitable claim upon the security furnished the surety by the debtor. In other words, it is claimed that *Frierson* became the surety of *Hutchinson & Greene*, for the payment of the debt to the plaintiff; and that *Frierson*, having received the property as security for his suretyship, the plaintiff can compel the payment of his debt out of this specific fund.

Admitting the doctrine to the fullest extent, I do not see how it is applicable to this case. *Frierson* was never the surety of *Hutchinson & Greene*. He made their debts his own, settled them, and carried on the farm in his own name, with full power and authority to employ whom he pleased; the plaintiff and his wife continued in *Frierson's* service after *Hutchinson & Greene* ceased to have the control of the farm, rendered their accounts against *Frierson*, and looked to him for payment. It is true that in settling with the plaintiff for the amount due him from *Hutchinson & Greene*, he did so by accepting a draft drawn upon him by *Hutchinson & Greene*. It is urged upon the authority of *ex parte Perfect*, (*Mont. Bank R.*, 85,) decided by the vice chancellor of England, that the holder of a bill of exchange is entitled to the benefit of the security upon the faith of which the drawee accepted. But, in my opinion, this doctrine is placed upon its proper footing by lord *Eldon*, in *ex parte Waring*, 19 *Vesey*, 345. In that case *Brickwood & Co.* accepted upon *Bracken & Co.;* both failed, and their effects went into the hands of assignees. The holders of

bills drawn by *Bracken & Co.*, and accepted by *Brickwood & Co.*, claimed that they had the right to have the collateral securities deposited with the acceptors applied specifically to the payment of their bills. Lord *Eldon* decided that these collaterals should be so applied, not because the bill holders had a right to demand it, but because the assignees of the drawers had a right to have the securities so applied, that the surplus, if any, might be paid over to them. In denying the equity of the bill holders, he says:

"The effect would be that from the moment of that deposit the bankers became trustees for these creditors, and could not come to any new arrangement with those whose debts are to be discharged. * * * * If these bill holders are to have payment in preference to the other creditors, it must be by effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hands of *Brickwood & Co.* * * * * * I think the bill holders must be paid, not as having demand upon these funds, in respect to the acceptances they hold, but as the estate of *Brickwood & Co.* must be cleared of the demand by their acceptances, and the surplus, after answering that demand, must be made good to *Bracken & Co.*"

From this we infer that *Frierson*, by taking this security for his acceptance of the draft of *Hutchinson & Greene*, did not become a trustee for the plaintiff; that the drawer and acceptor could come to any new arrangement they pleased with respect to the security deposited, and that the plaintiff's claim can be worked out only through the channel of *Hutchinson & Greene.*

But it appears that *Hutchinson & Greene* have come to a "new arrangement" with the representative of *Frierson*, and that they have no existing equity through which the plaintiff's claim can be established.

Let judgment be entered for the defendant.

DENNIS vs. BREED.

Fourth District Court for San Francisco Co., Dec. T., 1857.

NEW TRIAL—SEALED INSTRUMENT—CONSIDERATION.

The court will, as a general rule, grant a new trial, where, in the statement as agreed upon by counsel, upon which the motion therefor is based, it is misrepresented with respect to the instructions given the jury,—but if, in view of all the facts, the instructions, had they been given as thus incorrectly set out, could not have misled the jury, the motion will be denied.

By statute, in this state the defendant in an action brought on a bond by the obligee may plead and prove in defense the total or partial failure of consideration, but whether he has the same right against the assignee of the obligee, *quære?*

Where a defendant in such an action proposes to avail himself of this defense, as authorised by the statute—it being in derogation of the common law—he must plead it specially in his answer.

On motion for a new trial. The requisite facts are fully set forth in the opinion.

T. C. Hambly, for plaintiff.

Levi Parsons, for defendant *Melvin.*

J. S. Wallis, for defendant *Breed.*

J. C. Stebbins, for defendant *Frothingham.*

HAGER, J.—The principal ground relied upon to sustain this motion, is error of the court in its charge to the jury. The statement used on this motion does not correctly present the instructions of the court in the matter complained of, but inasmuch as the plaintiff, by not objecting, has admitted their correctness, I have felt inclined to order a new trial, although I am not satisfied that there was, in fact, any error of the court in its instructions to the jury.

The obligation sued upon is under seal, and its consideration is expressed upon its face as follows: "for the performance of which acts on the part of said obligors *Breed* and others, the said *Comstock* has paid and surrendered a good and lawful consideration to the full satisfaction of said obligors, and for which they are firmly bound and

hereby acknowledge the receipt." The instructions to the jury were to the effect that the action being upon a sealed instrument, with a valid consideration expressed and acknowledged upon its face, the defendants could not here dispute what they had admitted and acknowledged by the writing, and maintain, as a defense, the instrument was without consideration.

The attention of the court was called to the act of 1850, (*Wood's Cal. Dig.* 76, *art.* 201,) making it lawful for the defendant against whom an action is commenced by the obligee or payee upon a bond, to plead and prove as a defense a want or failure of consideration.

The defendants by their answer undertake to state what was the consideration; but even if the answer be taken as true, I am not prepared to say the bond is without consideration, or that it has in part failed. The defendants were unlimited in their proof, and upon the whole facts, as the case went to the jury, I am not prepared to say the charge as contained in the statement, if it had been so given, could have misled the jury.

Dennis having been substituted as the plaintiff of record in place of *Comstock*, strictly speaking, is not "the obligee or payee," and it may admit of doubt if the want or failure of consideration under the statute referred to, could, even if it had been pleaded, have been a defense against him. I think it also very questionable, if, under this statute, and in the absence of fraud, a defendant ought, in an action upon an obligation of this character, to be allowed to dispute the fact of a consideration having been paid and received, where it is expressed and acknowleged upon its face; at all events, to admit such a defense in such a case, would be in derogation of the common law, and if admissible under the *code* should be specially pleaded.

As all the facts will be presented to the supreme court, should the judgment be appealed, I have concluded to deny the motion for a new trial, although, as a general rule, I think a court, for its protection, should order a new trial, where it is misrepresented, as in this case, upon the record.

New trial denied.

CROSSETT vs. HASTINGS.

Sixth District Court for Sacramento Co., Feb. T., 1858.

ACTION—ASSIGNEE—CONTRACT—TORT.

A claim for damages arising in a *tort connected with a contract*, is a *chose* in action, and therefore assignable—and under § 4, of the *code*, an action for the recovery of such damages may be maintained by the assignee in his own name.

Semble that such a claim isnot assignable when arising in *tort*, independent of any contract.

On demurrer. The material facts are sufficiently set forth in the opinion.

Edwards & Long, for plaintiffs.

Winans & Hyer, for defendants.

BOTTS, J.—The complaint alleges an undertaking and agreement, entered into on the part of the defendant, with one *W. C. Crossett*, to loan out money deposited with him by *Crossett*, a breach, damage, and an assignment by *Crossett* to the plaintiff. The defendant demurs. The merits of the demurrer turn upon the assignability of this *chose* in action.

The common law courts originally refused to give effect to the assignment of a *chose* in action; but as trade and commerce grew into importance, the utility of extending the character of transferable property was recognized by the court of chancery. The courts of common law finally yielded to the pressure; and although they obstinately persisted in the old declaration that *choses* in action were not assignable, they admitted that the assignment vested an equitable title in the assignee; that he might institute a suit in the name of the assignor, for his own benefit, and that his title should be protected against the acts of the nominal plaintiff. So firmly was this right established in courts of law, that lord *Hardwicke*, in *Motteux* v. *London Assurance Co.*, (*Atkyns*, 545,) declared that the bare fact of assignment of a *chose* in action did not warrant a bill in equity; because the assignee had a full and complete remedy at law. So it was held by sir *Launcelot Shad-*

well, in *Hammond* v. *Messenger*, (9 *Simons*, 327;) and both of these authorities were approved by chancellor *Walworth*, in *Ontario Bank* v. *Mumford*, 2 *Barb. Ch.*, 596.

It was evidently in view of this idle retention of the name of the assignor as plaintiff, that the legislature of 1851 declared that every action should be prosecuted in the name of the real party in interest. *Code*, § 4. This clause was productive of two evils; the one imaginary, and the other real. It was supposed that this section might be construed to authorize the assignment of damages for a tort unconnected with a contract; and it is certain that, by freeing the record of the name of the assignor, he became a competent witness for his assignee. To remedy the imaginary evil, the legislature of 1854 declared that this section should not be deemed to authorize the assignment of an account, unliquidated demand, or thing in action not arising out of contract. This was no doubt intended to forbid the assignment of damages for tort unconnected with contract. But such a claim was never included in the term "*chose* in action." *Chitty* defines *choses* in action to be, "right to receive or recover a debt, or money, or damages for breach of contract, or for a *tort* connected with a contract." *Chitty Eq. Dig.*, 485; *Harr. Eq. Dig.*, 522; *Chitty Pr.*, 140. Consequently, when *choses* in action become assignable, actions for naked torts were not included in the rule. Now, the original statute did not touch the question of assignment at all; it only regulated the mode of prosecuting the action. Hence it was seen that the amendment of 1854, while it prevented an imaginary and impossible construction of the act of 1851, left the real evil untouched. Accordingly the *code*, § 4, as amended, provides that "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided; but in suits brought by the assignee of an account, unliquidated demand, or thing in action not arising out of contract, the assignor shall not be a witness on behalf of the plaintiff."

The only question that can arise upon the statute, as it now stands, is, whether, by implication, an action may not be brought upon the assignment of a thing in action not arising out of contract; in other words, upon the assignment of a tort. But, whether the statute enlarges the range of assignments or not, it certainly does not contract

them; and we have seen that even damages for torts connected with contracts were "*choses* in action," and, consequently, assignable.

I have been referred to the case of *Oliver* v. *Walsh*, 6 *Cal.*, 456, as sustaining the demurrer. The report of the case is evidently somewhat confused, but I see nothing in it which sustains the position of the defendant. That was a case of tort, unconnected with contract.

The demurrer is overruled.

EDDY vs. EDDY.

Fourth District Court for San Francisco Co., Feb. T., 1858.

REFEREE'S REPORT IN DIVORCE—FINDING.

A referee appointed in an action for divorce, after answer, where the order of reference specifies that he is to take testimony, try the issues and report a finding, must set forth a finding in his report, or it will be sent back for informality.

On motion to enter a decree upon the report of a referee.

White, for plaintiff.

Eddy, for defendant, *in pro. per.*

HAGER, J. — This action, upon the complaint and answer, was referred by consent of the parties, to take the testimony, try issues and report a finding to the court, but the referee has only reported the testimony. The case being at issue upon the complaint and answer under the order of reference, the proceedings before the referee should have been the same as upon issues of fact in any civil action, and in the manner in which they are ordinarily tried and reported upon, except that the testimony must be reported in full.

The action must be sent back to the referee for further report.

PIERCE vs. PAYNE.

Sixth District Court for Sacramento Co., Feb. T., 1858.

FORECLOSURE—MULTIFARIOUSNESS.

Two mortgages, executed by the same party, may be foreclosed by one bill, although they may not be executed upon the same premises.

On demurrer. The material facts are sufficiently referred to in the opinion.

Moore & Welty, for plaintiff.

Wallace & Rayle, for defendant.

BOTTS, J.—This is a bill to foreclose two mortgages, both executed by the defendant, the one direct to the plaintiff, and the other coming to him by assignment. The defendant demurred to the bill on the ground of multifariousness.

In *Curtis* v. *Tyler*, (9 *Paige*,) a bill was filed to foreclose two mortgages, executed by the defendant at different times, to different parties, both resting in the plaintiff by assignment. Chancellor *Walworth* held that the bill was not objectionable on the ground of multifariousness. It is true in that case stress was laid upon the fact that both mortgages rested upon the same premises; but our statute specifically authorizes the union of two claims against one defendant, for the recovery of separate pieces of property, and it may be held by distinct titles. If this can be done in an action at law, I do not see why the foreclosure of these two mortgages may not be united in a bill in equity. I can readily perceive that such a practice may lead to great complexity and involve a variety of issues; but our statute seems to prefer economy to convenience, and upon this view the supreme court appear to have acted in *Walker* v. *Sedgwick*, 7 *Cal.*, *Oct. T.*

The demurrer is overruled as to the defendant *Payne*, but is sustained as to *Payne's* wife and *Rogers*, there appearing no reason for making them parties to the bill.

SAEZ, ET UX. VS. HIGUERA.

Third District Court for Santa Clara Co., Nov. T. 1857.

TENANCY IN COMMON—ACTION FOR ACCOUNT—INFANCY.

Where one tenant in common of an estate, enters and takes possession without putting out or excluding his co-tenants, and without a demand of entry on their part, he will not ordinarily be liable to them for rents and profits in an action for an account.

He will only be liable where he is, by express appointment or by implication, the bailiff, manager, or agent of his co-tenants.

Under the statute of 4 *Anne, ch.* 12, he would only be liable to an account when the estate was productive at the time of his entry—but if the estate was unproductive, and he by his labor has rendered it productive, he would not be liable for rents and profits under that statute.

Where one co-tenant is an infant, and the other co-tenant has exclusive enjoyment of an estate, without putting out or excluding the infant, or a demand of entry by him, the tenant in possession will not ordinarily be liable to the infant for rents and profits in an action for an account, brought by the latter after his attaining majority.

If the tenant in possession is, by express appointment or implication, the bailiff of the infant co-tenant, he will be liable for intermediate rents and profits.

The mere entry by the adult co-tenant will not alone make him the bailiff of the infant co-tenant, for the entry is but the exercise of a legal right, and not an intrusion upon the estate of the infant.

Plaintiffs, defendants, and others, are and have been tenants in common of a tract of land, in the county of Santa Clara, acquired by descent. Upon the death of the ancestor there was an orchard upon said land, in a dilapidated condition, and which continued so until the defendant entered, when he inclosed the orchard with a fence, repaired the house, the former residence of the ancestor, planted some additional fruit trees, occupied the house as a residence, and has continued such occupancy, together with that of the orchard, for three or four years, without objection from, and with the knowledge of his co-tenants, and without being their manager or agent, either expressly or by implication, of the premises. The co-tenants, including the plaintiffs, had access to the orchard and premises when desired by them. There was no exclusion of them, by the defendant, therefrom. They equally participated in the use of the fruits—in addition to which the defendant

sold fruits and received money therefor, and took care of the orchard. The co-tenants of the defendant did not contribute to the expense of making the improvements, or to the taking care of the orchard. The wife, one of the plaintiffs, was an infant during the occupancy by the defendant.

This suit is brought for an account of sales of fruit, and to recover by the plaintiffs their *pro rata* share of the proceeds of said sales.

The question submitted to the court was, whether a tenant in common is entitled to a decree for an account against a co-tenant, where he merely occupied the premises without objection by, and with the knowledge of his co-tenant, and without being his agent or manager, having derived a profit from the sales of produce of the premises.

Ryland & Wallace, for plaintiffs.

Yoell, and *Archer, & Vories*, for defendant.

HESTER, J.—I take the common law to be that a tenant in common who occupies the whole estate, without any claim on the part of his co-tenants to be admitted into possession, and without hindrance by him of such possession, is not liable to his co-tenants in an action of account, nor in any other form of action. 5 *Bac. Ab.*, 307. It is stated by that author (p. 304) that at common law one tenant in common has no remedy against the other, where he receives the whole profits of the estate, for he could not be charged as bailiff or receiver to his companion, unless he actually made claim so. 1 *Co. Litt.*, 200 (*b*).

In the case of *Henderson* v. *Eason*, (9 *Eng. L. & Eq.*, 337,) which was an action of account brought by a co-tenant, the court remarked, there is no doubt, before the statute of *Anne*, if one tenant in common occupied the premises, and took the whole profits thereof, the co-tenant had no remedy against him, while the tenancy in common continued, unless he was put out of possession, when ejectment would lie, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, in which case an action of account would lie against him as bailiff.

In the case of *Woolever* v. *Knapp*, (18 *Barb.*, 265,) which was an action of account, brought by the plaintiffs against the defendant, who

were all tenants in common of one hundred acres of land, the defendant had enjoyed the sole possession of the farm for five years—the use thereof was worth $200 annually. The court decided that "the rule is well settled at common law, that one tenant in common of real estate, who occupies the whole estate, as in this case, is not liable to an action of account for the sole use and occupancy" of the premises. For, said the court, if this were not the true principle, one tenant in common might keep out of the premises his co-tenant, except upon terms of paying rent. That as it is in the power of co-tenants to occupy at any time, the omission to do so would seem to imply an assent on the part of the other tenant that the occupying tenant should occupy the whole.

The cases of *Seargent* v. *Parsons*, (12 *Mass.*, 149,) and of *McMurray* v. *Rawson*, (3 *Hill*, 70,) are to the same effect.

In the case of *Nelson's heirs* v. *Clay's heirs*, (7 *J. J. Marshall*, 139,) in chancery, the facts showed that the parties were tenants in common. The circuit court, by decree, directed an account to be taken of the rents and profits, and improvements. The commissioners reported that the value of the improvements made by the appellants amounted to $1540, and that the rents for the use of the land amounted to $2,450 69; thus showing an excess of rents, which the circuit court reduced to $838 67. This sum the circuit court decreed should be paid. The supreme court said that, "according to the doctrines of the common law, one tenant in common was not liable to his companion for waste, or the profits of the estate. The injustice of this doctrine was obviated in England by the statutes of *Westminster* 2, and 4 *Anne*, *ch.* 16; the first giving an action of waste, and the second an account for the profits. The provisions of the statute of *Anne* were in substance adopted by the act of the colonial legislature of 1748; also by an act passed in 1784, authorising actions of account in favor of one joint tenant, or tenant in common, against another as his bailiff, for receiving more than his just share. Therefore one tenant in common is liable to his co-tenant for the excess of rents and profits above his share, under said statutory provisions. But when the estate at the commencement of the tenancy yields no profits, and one of the co-tenants enters and by improving the estate, renders it productive, the co-

tenant who expends neither money nor labor, cannot come in for a share of the profits. The statutes were not designed to create a right in favor of a co-tenant who expended nothing, to share the profits resulting from the money or labor of another, but they were intended to apply to an estate which yielded profits when the tenancy in common commenced. There is no principle upon which the appellees can base their claim. It is clear that it could not be done at common law, nor is there anything in our statutes to authorise it."

The case at bar must be determined upon common law principles, as the English statutes are not in force in this state, nor has there been any enactment here upon this subject, except the act adopting the common law.

The above authorities establish the common law principle, that such occupancy, where the co-tenant is not excluded, is not an invasion of any person's right, but an exercise of a legal right; and if, by the industry or money of the occupying tenant, he realizes a benefit, it is not the foundation of a claim in favor of his co-tenant. The improvements which the occupying tenant makes, and his cultivation of the land, are at his risk; for the co-tenant may, at any time before the crop is severed from the land, enjoy it equally with the producer—but when separated by the producer it belongs to him. Surely no one would contend that the occupying tenant, if, after much expenditure of money, he should fail in his crop, had a right to call upon his co-tenant to share with him in that loss; and if not, the rule would apply with equal force where a profit had been made, to exclude him from participating in that profit. But if the occupying tenant is, either by express agreement or by implication, a manager or agent of his co-tenant, the law is otherwise, and he is responsible and should account to his co-tenant.

In *South Carolina* and *Alabama* the law is settled that a co-tenant should account for the use of land which does not require improvement to make it productive. *Thompson* v. *Bostwick*, 1 *McMullan, Ch.* 75; *Holt* v. *Robertson*, 1 *McMullan, Ch.* 475; *Hancock* v. *Day*, 1 *McMullan, Ch.* 69 and 298; *Pope* v. *Haskins*, 16 *Alabama*, 321. These adjudications seem not to have been made upon the English common law; and notwithstanding the weight that is deservedly attached to these authorities, they are insufficient to overcome the force of the said *English*, *New York*, and *Kentucky* adjudications.

The plaintiffs contend that if a man intrudes himself upon the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible therefor to the infant in an suit in equity. 2 *Story Eq. Jur.*, § 1356.

The answer to this is obvious. The defendant in the case at bar is neither a trespasser nor an intruder. The question is one of right to the profits of the land. The rights of an adult and of an infant in this particular are upon the same legal platform. There are eleven co-tenants, many of the age of majority; if the latter are not entitled to this money, as matter of right, it would require some cogency of argument to establish the right of recovery in this action in the infant plaintiff.

The court has been referred by the plaintiffs to 1 *Story Eq. Jur.*, § 466; but the equity principle there recognized is, that where certain relations exist, creating a right to the thing which is the object of the suit, as in cases of tenants in common, where one acts as bailiff or manager for the others, he is responsible and accountable to them on the ground of their right to the money or property in his hands.

It is also urged by the plaintiffs that although at law they may have no remedy, yet in equity they are entitled to relief. But the authorities above cited, which sustain the defendant's defense, are adjudications in both courts.

In the case at bar, without the care and labor of the defendant, the premises might not have yielded any profit, and the authorities are nearly all one way, that in such cases the co-tenant is not entitled to an account. And the preponderance of authority is to the same effect where the premises yielded profits when the tenant entered.

Therefore it is ordered and adjudged that the plaintiffs take nothing by their suit, and judgment for costs is ordered for the defendant.

PAULI vs. CARSS.

Fourth District Court for San Francisco Co., Feb. T., 1858.

MOTION TO SET ASIDE REFEREE'S REPORT—EXCEPTIONS.

Where a motion is made to set aside the report of a referee, the moving party must file

with the papers, when they are submitted, his exceptions to the report, or some statement of the grounds upon which he relies to sustain his motion.

On motion to set aside the report of a referee. The referee found in favor of plaintiff, and defendant moved to set the report aside, but did not file any statement of the grounds relied upon in support of the motion.

Holladay & Cary, for plaintiff.

Pixley & Smith, for defendant.

HAGER, J.—I find this case with the report of the referee submitted by consent of parties; bnt I am at a loss to determine the point or matter I am called upon to decide. There are no reasons or statements setting forth the grounds relied upon to set aside the report, or as objections to its confirmation. Neither does the brief of defendants with the papers, present the point that is submitted, or that I am called upon to pass upon. There should be something of record to define the motion, and to show upon what it is based. As the case is presented, I can decide nothing. It would be improper to set the report aside, and its confirmation is not asked by the submission.

WHEATLEY vs. SHOBE.

Sixth District Court for Sacramento Co., Feb. T., 1858.

GARNISHEE—INTERVENTION.

S. being indebted to W., the latter drew an order upon him, payable "to bearer;" W. was also indebted to H. W. commenced an action against S. for the recovery of his debt. S. set up that he had been garnisheed by the creditors of H., for whose benefit he avers the order was originally drawn. The creditors of H. also garnisheed W., and filed a bill of intervention in "W. v. S.," claiming that they had a right to the specific proceeds of the judgment.

Held, that the defense set up by S. was insufficient, and that intervenors could not maintain their claim.

The requisite facts are fully referred to in the opinion. Tried by the court, a jury having been waived.

BOTTS, J.—The plaintiff alleges that the defendant is indebted to him in the sum of $236 50. The answer admits the indebtedness, but alleges that the plaintiff drew an order on him, the defendant, for the said sum; that the order was payable to "bearer," but was intended for one *Howell;* that defendant never accepted said order, and that he has been garnisheed by creditors of *Howell*. This clearly constitutes no defense to plaintiff's demand, and therefore the demurrer to to the answer must be sustained, and judgment rendered for the plaintiff.

But *Wilcox & Co.* file a bill, praying to be allowed to intervene, setting up a prior right to the debt originally due from *Shobe* to *Wheatley*. They allege that they are judgment creditors of *Howell;* that *Wheatley*, being indebted to *Howell*, drew an order on *Shobe* in favor of *Howell* for the amount of the debt due from *Shobe* to *Wheatley*, and that the said order was accepted by *Shobe;* and that both *Shobe* and *Wheatley* were served by notice of garnishment of their claim against *Howell*. If these allegations be all true, I do not see that they establish an equitable title in the intervenors to the specific proceeds of this judgment. In the first place, the order by *Shobe* may have been returned to *Wheatley* by *Howell*, in consequence of the non-payment by the acceptor. In that event, it is true, *Wheatley* would have still remained indebted to *Howell*, and may have become liable to *Howell's* creditors by process of garnishment served upon him; but it is not, it seems to me, in this suit that the claim of the intervenors against either *Shobe* or *Wheatley* is to be determined. If either *Shobe* or *Wheatley* was indebted to *Howell* at the time of the garnishment, there is a process, and a very summary one, by which the intervenors can obtain judgment against them, and it is to that remedy that the petitioners must be left.

The petition of the intervenors is denied.

COHN vs. BLUMENBURG.

Fourth District Court for San Francisco Co., Feb. T., 1858.

DEMURRER—SLANDER—CHARGE OF LARCENY.

An allegation in a complaint in an action for slander, that defendant "with *intent* to cause it to be believed, &c., that plaintiff had been guilty of the crime of *larceny*, said of plaintiff that "He is a thief. He sold tickets for me and stole the money," *or* "converted the proceeds to his own use," *or* "converted the proceeds," held sufficient upon demurrer.

Upon demurrer to six out of eight counts in a complaint for slander; the second, third and fourth counts charged defendant with saying of plaintiff "with intent to cause it to be believed * * * that plaintiff had been guilty of the crime of larceny, * * * 'He is a thief. He sold tickets for me and converted the proceeds to his own use.' 'He is a thief. He sold tickets as my agent and converted the proceeds to his own use.' 'He is a thief; he sold tickets for me and stole the money.'" The sixth, seventh and eighth counts allege the publishing of the same words of plaintiff in his profession. Demurrer on the ground that the words as laid "do not charge the plaintiff with the crime of larceny"; defendant contending that they disclose only a breach of trust.

Harmon & Labatt, for plaintiff.

J. B. Hart, for defendant.

HAGER, J.—This is a demurrer upon the ground that the words charged do not accuse plaintiff of the crime of larceny. I think, however, the allegations in some of the counts are sufficient. Whether under our statute concerning crimes and punishments they do not amount to a charge of larceny, I deem it unnecessary to consider very fully. It is alleged that they were spoken with *intent* to cause it to be believed that plaintiff was guilty of the crime of larceny, and I think that this averment obviates the objection that they do not really make the charge. It is also to be observed that each count charges the speaking of the express words, "He is a thief," and whether, even

if unaccompanied by the allegation concerning the intent of the defendant at the time of the speaking, the subsequent portion of the charge so far modifies these words as to deprive them of the effect which they would receive if alone, may admit of question. However, in view of the averment with respect to the intent with which they were uttered, I think that some of the counts demurred to are sufficient. The complaint is very badly drawn—containing eight separate counts where one would be sufficient, and covering some sixteen pages of paper instead of one or two, which would have been sufficient. One of the objects of the *code* is to relieve the parties and the courts from considering such complaints and other pleadings as the old system required, and of which this may be regarded as an example. The first and fifth counts each charge defendant with calling plaintiff "a thief," and this simple allegation, under our system, is all that is required in order to introduce the same, and as much proof as can be brought in under the eight counts in this complaint.

This fact also makes the question of the demurrer pretty much immaterial, for even if it were sustained, the first and fifth counts contain all that is necessary as a cause of action.

If the defendant had drawn his demurrer to each count separately, instead of to the six collectively, I would probably have sustained it as to most of the counts, but as it is, if any one count demurred to is good, the demurrer cannot be sustained. In the form in which it is drawn it must be sustained or overruled as an entirety.

Demurrer overruled, with leave to answer, &c.

INCHES vs. VAN VALKENBURGH.

Fourth District Court for San Francisco Co., Feb. T., 1858.

UNDERTAKING ON ATTACHMENT—SURETY—HOUSEHOLDER.

A householder, within the meaning of the rule requiring the sureties to an undertaking upon which a writ of attachment has been issued, to justify as residents and householders, is one who has the entire or a temporary dominion of a house or residence, and not merely one who rents an apartment, although he may be a permanent resident.

On motion to show cause why a surety on an undertaking upon which a writ of attachment had been issued, should not be held incompetent on the ground that he was not a householder.

Rabe and *Willson*, for plaintiff.

H. S. Love for defendant.

HAGER, J.—I think that the facts established by the proof taken before the clerk upon the exception to the sufficiency of this surety, render him incompetent. The only question is as to whether a party in order to justify as a "householder" under the rule of this court, and within the meaning of § 122 of the *code*, must not possess some further qualification beyond that of merely renting apartments in which he may reside. I think that he must. It is required that he should be a resident *and* householder, which, it seems to me, clearly contemplates that he must have at least the entire or a temporary dominion over and control of a house or residence, though of course he need not necessarily be the owner of it.

The case of *Meyer* v. *Scannel*, (1 *Cal. Dist. Court* 6,) in which I am reported to have held differently, is not correctly reported; I did not rule in that case as is represented by the report. Plaintiff must file another undertaking in compliance with the statute and the rule of this court, within —— days, or in default thereof the attachment must be discharged.

PEOPLE vs. METZ.

Sixth District Court for Sacramento Co., Feb. T., 1858.

INSANITY.

Insanity, in its legal meaning, as exempting the perpetrator of a homicide from punishment for the act, is that state of mind in which the actor is unconscious of the nature, character, and consequences of his act.

However feeble the mental powers may be, the condition of the mind is not that of insanity, provided that it is capable of distinguishing the nature and consequences of the crime committed.

People *vs.* Metz.

If the defendant is actuated by any motive in committing a homicide, the plea of insanity cannot be sustained—for it is only the absence of all motive that constitutes insanity. The act must be objectless.

This was an indictment found against the defendant for the murder of a young woman, whom it was proven he had proposed to marry. The facts of the case are immaterial, as only so much of the charge of the court to the jury is given as bears upon the plea interposed—namely, insanity.

R. F. Morrison, district attorney.

————————, for the prisoner.

BOTTS, J.—(Upon the plea of insanity) instructed the jury.

The defendant relies upon the plea of insanity.

Legal punishment is founded upon the presumption that man, in his normal condition, is capable of controlling his actions, and squaring his conduct to the established standard. When the loss of this control is occasioned by that momentary maddening which great provocation produces in the most reasonable minds, and under the sudden impulse a homicide is committed, the act, by law, is denominated "manslaughter." It is only the momentary blindness produced by the passing wave of passion that the law respects. Perhaps, to be entirely consistent with our ideas of justice, an act proceeding from irresistible passion ought not to be punished at all. That, however, is a question for the moralist and legislator. We sit here to discover the law, and to administer it as it is, and not as it should be. We are to remember, too, that the rules of law are the dictates of policy, instituted for the good of society, to which all abstract views of right and wrong are made to bend. There can be no doubt that the punishment affixed to manslaughter serves to strengthen the will, and render an impulse controllable that would otherwise be irresistible.

There is another state of the mind, if it be not a paradox to call it so, nearly allied to that which may give rise to manslaughter, but clearly distinguishable from it. This occurs when reason is entirely, though momentarily, dethroned, and the actor is unconscious of the nature, character, and consequences of his act. This the law denomi-

nates "insanity;" and, for an act under such circumstances, it holds the actor irresponsible. If such, in your opinion, was the mental condition of the defendant when he struck the fatal blow, then is he entitled to a verdict at your hands of "not guilty."

There are undoubtedly many degrees of mental derangement, or insanity, in the common acceptation of the term, and even as it is used by medical men, that fall short of this state of unconsciousness; and much metaphysical refinement has been expended in the discussion of this subject, both by counsel and the authors upon medical jurisprudence whom they have cited. But from these subtle inquiries you are happily relieved; the rule of law, with which alone you have to do, is simple, plain, uncontradicted, and such as I have expressed to you. *Dr. Taylor* himself, in speaking of these medical tests of insanity, of which you have heard so much, says:

"These supposed criterea have been repeatedly and very properly rejected, when tendered as medical proofs of insanity, in courts of law. They are of too vague a nature, and apply as much to cases of moral depravity as of actual insanity. In short, if these were admitted as *proofs*, they would serve as a convenient shelter from punishment for many sane criminals."

Under this stringent rule of law, a defendant may be found legally guilty who is free from moral taint; but under such circumstances our duty is plain and unmistakable; the law must have its course, and the convict can look to the executive clemency only, to save him from the penalty affixed to his act. One of the most signal cases of legal guilt and moral innocence of which we have any note in history, occurred a few weeks since in a neighboring county. An affectionate husband, a fond father, a refined and educated man, an upright citizen, calmly and deliberately plans and perpetrates the murder of his wife and four prattling children, for the sole purpose of saving them from misery and destitution; firmly believing that he was consulting their happiness in sending them into another and a better world. Had he survived the bloody tragedy he would undoubtedly have been amenable to the charge of murder, although his triers might have admired the devotion, the resolution, and the power of will involved in such a sacrifice of feeling for those he loved. But such acts, no matter from what motives they

proceed, are forbidden, and rightly too, by the stern requirements of society. The only question that policy will permit us to ask is, did the actor knowingly violate the law of his country? To do so is itself a great wrong, and in this sense it may be said all legal guilt includes moral guilt.

The first and main question then, gentlemen, for your consideration is, did the defendant know what he was doing when the homicide was committed, of which he is the admitted author? In considering this question you are to weigh the whole testimony tending to show the mental condition of the defendant before and after the bloody deed—only though as throwing light upon the condition of his mind at the moment of its perpetration. You are to distinguish between frivolity, vanity, eccentricity, or conceit, and total imbecility. The law very properly declines to enter into the consideration of degrees of imbecility. No matter how feeble may be the mental powers, as long as the capability of distinguishing and understanding the nature and consequences of the crime committed remains, the perpetrator is held responsible. With respect to the motive that may have influenced the defendant, I will say to you, that it is only the absence of all motive that would constitute insanity. This is the definition rather than the proof of insanity. We are not to confound motive with provocation. If the defendant acted without provocation—without any malignant feeling toward the deceased particularly, but was prompted by a reckless indifference to the spilling of blood, or a desperate disregard of his own continued existence, he might be chargeable with implied instead of express malice, and his crime might be reduced from murder in the first, to murder in the second degree. But when the act is objectless, without aim or meaning, then is the actor unconscious and insane.

CAREY vs. ELLIS.

Sixth District Court for Sacramento Co., Feb. T., 1858.

STOPPAGE IN TRANSITU—SALE UNDER EXECUTION.

The right of stoppage *in transitu* is lost to a vendor, if he allows a sheriff (who had

seized the goods before they came to the vendee's possession, under process of attachment issued at the suit of creditors of the vendee,) to sell them under execution without a claim or demand being made for them by the vendor prior to the sale.

A demand for the proceeds while in the sheriff's hands and before paid over to the creditors, is too late as an assertion of the right of stoppage *in transitu*.

Had the vendor demanded the goods prior to the sale—*semble* that he could have adopted the sale and have recovered the proceeds.

This bill was filed to obtain an injunction restraining the payment of the proceeds of the sale of certain property of an insolvent firm to certain of the creditors, and praying that it may be decreed that payment be made to plaintiff. The requisite facts are fully set forth in the opinion.

The names of counsel have not been furnished.

BOTTS, J.—The plaintiffs allege that the defendants *Ellis & Grostine* purchased from them, in November last, one hundred and twenty quarter sacks of flour, on credit; that whilst the flour was in the hands of a middle man, in the city of Sacramento, it was attached and sold by defendants *Egl* and *Knight*, *Harmon & Childs;* that it has been sold for the benefit of *Egl*, and that the defendant, *Talbert*, a constable making said sale, has the proceeds now in his hands as a separate and distinct fund; they allege that *Ellis & Grostine* became insolvent after the purchase, and whilst the flour was in the hands of the middle man; they also aver that they have demanded the proceeds, which are less than the amount of their claim, from the defendant *Talbert*, and that he has refused to comply with their demand. They pray for a perpetual injunction against *Talbert*, prohibiting him from paying over the said money to either of the other defendants, and that he may be ordered to pay over the same to the plaintiffs. An order was made requiring the defendants to show cause why the prayer of the bill should not be granted, and a restraining order was issued. The defendants appear and show for cause the want of equity upon the face of the bill.

The plaintiffs insist that the principle of the doctrine of "stoppage *in transitu*" entitles them to the proceeds of this flour. It is a cardinal principle that the vendor's lien, when he once parts with his goods,

is revived *only* by his arresting them before they reach their destination. Up to that period he can claim them in the hands of any intermediate agent, and even in the possession of creditors. If his demand be disregarded, *trover* will lie against the wrongful withholder. When the goods have passed beyond his reach, he has lost the opportunity to revive his lien. The only actions that can grow out of this doctrine, I apprehend, are *trover* and *detinue*. But it is admitted that the goods are in the hands of an innocent purchaser, and beyond the reach of the vendors. I think it follows that, as the opportunity of stoppage *in transitu* was lost, the vendor stands upon the footing of every other creditor.

My attention has been called to the case of *Hause* v. *Judson*, 4 *Dana*. A critical examination of that case will show that it has no tendency to sustain the plaintiff's position; although, the goods having been sold, the proceeds were distributed and the priority of the vendor's lien was recognised. But there are two things to be observed in that case; first, the sale was made under an order issuing from the court of chancery, from which the attachments issued, directing the middle man, in whose hands they were attached, to sell them, and to hold the proceeds, subject to the future order of the court; and, secondly, and mainly, that the goods were demanded of the middle man, before he sold them, by the vendors. This, in the opinion of the court, amounted to the right of stoppage *in transitu*, and perfected, or renewed, the lien of the vendor. So, if in this case the goods, being in the hands of the sheriff ordered by the execution to sell them, had been demanded of him by the plaintiffs, he would have been liable in *trover;* or, probably, if the vendors had so fixed their lien, they might have adopted the sale and sued for the proceeds; they would, then, have relied upon a count for money had and received. But the difficulty here is, that the plaintiffs never perfected their lien; it is too late, after the goods are sold and delivered, either by the vendee himself or by his creditors, under the operation of the law; by the delivery, in the one case or the other, they have reached their final destination. This is precisely the doctrine to be drawn, inferentially, from the language of the court in the case of *Hause* v. *Judson*. They say: "The attachment did not, as we have seen, defeat the vendor's right, to

which the goods, being then *in transitu*, were subject. Nor could the subsequent proceedings under the attachment destroy the right, *if asserted before the goods were actually sold and dispersed* under the order of the chancellor, and the proceeds appropriated by his decree." Here, the goods have been sold and dispersed before the right was asserted, and no decree is necessary for the appropriation of the proceeds.

The prayer of the bill is denied, and the restraining order is discharged.

ROWLAND vs. LIEBY.

Fourth District Court for San Francisco Co., Feb. T., 1858.

FORECLOSURE—(JUDGMENT IN)—SALE—INJUNCTION.

In an action to foreclose a mortgage, it is irregular to take a judgment and decree of foreclosnre, order of sale, &c., and also to enter a separate judgment at law for the amount due upon the note. If such separate judgment be entered, it will be set aside, and plaintiffs enjoined from proceeding under it.

Under our system of practice, if, after the sheriff has made the return, it appears the amount realized by the sale of the mortgaged premises is not sufficient to pay the whole debt, then upon an application to the court, the balance will be ascertained, and execution as in ordinary cases will issue for the amount found unpaid.

If there is any dispute as to the true amount remaining unpaid after the sale, if necessary a reference may be ordered to report the amount due before execution issues.

This action was brought to obtain an injunction restraining defendant *Scannell* from proceeding to sell certain property under execution, and to have the judgment upon which the execution issued, declared void. In the early part of 1851, plaintiff *Rowland* executed a mortgage to the defendant *Lieby*, which was by the latter in the latter part of the same year foreclosed. The decree in the action brought to obtain the foreclosure was taken by default, and "adjuged that there is due from defendant, (*Rowland*,) to plaintiff, (*Lieby*,) the sum of $445 33, and the mortgaged premises be sold, &c.," and directed the manner in which the proceeds should be appropriated to the payment of the costs, debt, &c. On the same day the clerk entered a judgment

by default against *Rowland* for the same sum, to wit, $445 33, with interest at the rate of five per cent. per month, and costs of suit, taxed at $125 65. The sheriff returned on his proceedings under the decree, that there remained deficient after applying the proceeds of the mortgaged premises as directed in the decree, the sum of $217 88. Defendants have issued execution, without making application to the court, upon the judgment referred to, which was entered cotemporaneously with the decree—for this sum of $217 88, as reported deficient, and interest. Under this execution defendant *Scannell* threatens to sell certain real estate now owned by plaintiff *Rowland.*

John & M. D. Wilson and *H. S. Love*, for plaintiff.

G. F. & W. H. Sharp and *J. D. Creigh*, for defendant.

H. S. Love, for plaintiff.

First. There is no legal and valid judgment upon which an execution can issue.

I. The statute provides that the party shall apply to the *court* for the relief demanded, and the clerk had no authority to enter judgment by default, for the amount of the debt.

II. Neither the clerk nor the court has any power to enter a money judgment on a mortgage, even when the action is brought directly on the mortgage to recover the amount of the mortgage debt, unless the mortgage contains a covenant to pay. *Shafer* v. *Bear and Auburn Water and Min. Co.*, 4 *Cal.* 294; *Culver* v. *Sisson*, 3 *Comst.* 264, and the numerous cases there cited.

Second. In an equity action to foreclose the equity of redemption of the mortgagor in the mortgaged premises, the only relief which the party can be entitled to have, is—*first*, that the equity of redemption be foreclosed, and *second*, a sale of the mortgaged premises, and in the case of a deficiency arising on said sale, that the master, (the sheriff in this state,) report to the court the amount of such deficiency and on the coming in and confirmation of such report, then that the plaintiff have an execution for the amount of such deficiency, against the property of the party who was primarily liable for the debt. The

sheriff acts as a ministerial officer; the court determines the amount of the deficiency upon the report of its officer. The determination of the amount of the deficiency so as to entitle a party to an execution is a judicial act, and can only be done by the decision of the court. *Ord* v. *McKee*, 5 *Cal.* 515. The courts in *New York* have repeatedly held that a party is not entitled to an execution until the report of sale by the master has been confirmed by the court, and the amount of the deficiency ascertained and examined. *Bank of Rochester* v. *Emerson et ux.* 10 *Paige*, 350. In this case there was no report of sale made by the sheriff, no confirmation, and the amount of deficiency in no way determined or ascertained by the court. But upon the judgment entered by the clerk for the whole amount, execution has been issued to enforce the collection of so much of the judgment as by the sheriff's return under the decree, seems not to have been satisfied. We think the execution cannot be enforced.

G. F. & W. H. Sharp, for defendants.

(The points made by defendant's counsel were not passed upon by the court, nor did counsel make any argument upon the point considered by the court.)

HAGER, J.—The money judgment of Sept. 9, 1851, of *Lieby* v. *Rowland & Staples*, is irregular and must be set aside. The judgment and decree of foreclosure of the same date, was all the relief the plaintiff in that action was entitled to. The order of sale and the sale under the decree of foreclosure appears to be regular so far as I have observed. After the sheriff made his sale and report, application should have been made to the court to have the balance ascertained for which execution might issue. This execution has been issued irregularly, and must be set aside. *Leiby*, however, will be entitled to make application to the court to ascertain the balance due after the payments and proceeds of sale are credited, and to have execution for the amount declared. If it is necessary, a reference may be ordered, and all the questions in this action may be passed upon in settling the balance due on the decree and judgment.

Decree ordered accordingly.

PENNIMAN vs. SWEETZER.

Fourth District Court for San Francisco Co., Feb. T., 1858.

ATTACHMENT—CONTRACT—ACCOUNT STATED.

A., residing out of this state, forwarded goods, to be sold on commission, to *B.*, residing in this state, who forwarded *A.* a stated account of the sale and balance due *A.* *A.* brought an action for this amount—"found due upon an account stated"—and caused a writ of attachment to be issued. Upon motion to discharge the same upon the ground that the action was not brought upon "a contract, express or implied, for the direct payment of money, made or payable in this state," it was

Held, That—inasmuch as the action was brought—not alone for a breach of the original contract—but also on the account stated, which created a liability independent of that growing out of a breach of the original contract, and which account purported to be made and dated in this state—the writ was properly issued.

On motion to discharge a writ of attachment. The requisite facts are sufficiently set forth in the opinion.

E. Casserly, for plaintiff.

Janes, Lake & Boyd, for defendant.

E. Casserly, for plaintiff:

An account stated imples a new promise to pay the balance found due. *Truman* v. *Hurst*, 1 *T. R.*, 42; 10 *Barr.*, 425; *Yates* v. *Gardiner*, 5 *L.* & *Eq.*, 541; *Knowles* v. *Michel*, 13 *East.*, 249; 3 *Black's Comm.*, 158, 161–2–3; *Holmes* v. *D'Camp*, 1 *Johns.*, 34–6.

HAGER, J.—The plaintiff, residing in the city of New York, forwarded goods, etc., to defendants, merchants, residents of San Francisco, to be sold on commission, and proceeds to be remitted to plaintiff. Defendants sold the goods, and forwarded a stated account, containing the net proceeds of the sales, the charges against them, and the balance due the plaintiff.

Motion is now made to discharge plaintiff's attachment, issued at the commencement of the action, on the ground that plaintiff has not sued upon a contract which is made, or is payable in this state.

There was a breach of the original contract, on the part of the defendants, when they forwarded the account showing the amount due, and omitted to remit the money to plaintiff.

The account is dated San Francisco, November 30, 1857, and creates a liability, independent of the original liability, that may, *per se*, be a substantive cause of action. The complaint alleges an indebtedness found due upon *the account stated*, and upon the affidavits submitted, taken in connection with the allegations of the complaint, I am of the opinion that it sufficiently appears that the action is upon an implied contract for the direct payment of money, which contract is made and is payable in this state, within the meaning of our statute.

Motion denied.

TOOTHAKER vs. CORNWALL.

Sixth District Court for Sacramento Co., April T., 1858.

RES ADJUDICATA—NEGOTIABLE NOTE—DEMAND—NOTICE.

A point once decided by the court of last resort, is conclusive of the law of the particular case, and although the principle may afterwards be overruled, yet it is binding on the court below, the case being remanded for further proceedings.

Payment of a negotiable note may be demanded at any time during banking or business hours (according as the note is payable at bank or otherwise) of the last day of grace, and notice, in case of non-payment, thereupon given to the endorser, will not be premature.

Action brought by the holder against the endorser of a promissory note. The necessary facts are set forth in the opinion.

J. B. Haggin, for plaintiff.

Winans & Hyer, for defendant.

BOTTS, J.—On the eighth day of November, 1850, one *Barton Lee* executed and delivered to the defendant his promissory note, whereby he promised to pay to the order of the defendant the sum of five thousand dollars, on the first day of July following, with interest at the rate

of one per cent per month. The note was by the defendant endorsed and delivered to the plaintiff, who is still the owner and holder thereof, and no payment has ever been made thereon. Upon the third day of July, 1851, the plaintiff gave the defendant notice of his inability to find the maker, and of the non-payment of the note; and at four o'clock, P. M., of the fourth, the agent of the plaintiff again informed the defendant of his inability to find the maker, and that the holder would look to him for payment. The defendant replied that *Lee* was in the mines, and that he would not pay the note unless he was compelled by law, or words to that effect.

It is contended by the defendant's counsel, first, that this case is *res adjudicata;* and, secondly, that the notice of dishonor was premature, and therefore ineffectual.

This case has already been twice before the supreme court; and, as it seems to me all the questions raised upon this trial have been considered and finally adjudicated in the court of last resort. Upon the first trial of this cause, my predecessor held that the note matured upon the third day of July, and that evidence of demand and refusal on the fourth was irrelevant. This, upon appeal, was held to be error; the appellate court determined that the note matured upon the fourth, and remanded the cause for further proceedings. Upon the next trial, the plaintiff proved notice to the defendant at 4 P. M., of the fourth, of his search for and inability to find the maker. Judgment was again rendered for the plaintiff. Upon appeal, the supreme court held that the notice being given before the close of business nours, was premature and ineffectual. The judgment was reversed and the cause remanded.

The questions presented for my consideration are precisely those passed on by the supreme court, in this same case, as reported in 4 *Cal.*, 28. In *McFarland* v. *Pico*, 7 *Cal.*, Oct. T., the court alludes to the general language of Mr. justice HEYDENFELDT, who delivered the opinion in this case, and condemned it. Following in the wake of such authority, I venture to say that I have no doubt that the law enunciated in the opinion of judge HEYDENFELDT, if not limited by the facts of the case, is opposed to the current of authority. I think there is no doubt that the payment of a negotiable note is demandable at any rea-

sonable hour of the day of its maturity, and that upon refusal, notice of dishonor immediately given to the endorser, will not be premature. Nor is there any question that search for, and inability to find the drawer, dispenses with the necessity of demand; but whether this constructive demand and refusal accrues before the close of business hours, has not been definitively settled. The nearest approach to it is the case of *Hartley* v. *Case*, 1 *Carr. & Payne*, 556. In that case demand being made on the drawer at an early hour of the day, he said he had no funds then, but he expected to pay during the course of the day; notice of dishonor was immediately given to the endorser. At *nisi prius*, the notice was held premature; but the court in *banc* are reported as saying that the notice would be effectual or ineffectual as the note might or might not be paid during the day. Their meaning seems to be that although payment is demandable at any hour of the day, the drawer has the whole day to pay, and he may discharge his liability during the day by paying, or tendering the face of the note; in which event the costs of protest and notice would fall on the holder. This was the case upon which lord *Kenyon* and J. *Buller* differed in *Seftly* v. *Mills*, 4 *Term*. The doctrine of *Hartley* v. *Case* has been affirmed in the case of *Clowes* v. *Chaldecote*, decided by the court of King's Bench, Hilary T., 1839; reported 7 *Jurist*, 147.

These were both cases of actual demand and failure of immediate payment. The question decided in *McFarland* v. *Pico*, is the case of actual demand and positive refusal. But it is unnecessary to pursue this inquiry. Had the supreme court, in *McFarland* v. *Pico*, instead of condemning the general language of the opinion, declared that the decision in this case was erroneous, it would have been still the law of the case; a point once solemnly decided by the court of last resort, is no longer open to investigation, either in the court below, or in the appellate court itself. There would be no end to litigation if the supreme court could review and change its own decisions. Such is the established doctrine, signally enunciated in *Dewey* v. *Gray*, and never, to my knowledge, questioned in any decision of the supreme court. In *Stearns* v. *Aguirre*, 7 *Cal.*, April T., cited by the plaintiff, the court held that a simple judgment of reversal was not necessarily conclusive of the whole merits, but left the case to be tried *de novo* in the court below.

Under such circumstances they will, when the case is again brought before them upon appeal, look to the record to see what points have been, and what have not been passed on before; holding themselves bound only by what has been actually decided. In this opinion they fully sustain the doctrine of "the law of the case."

Without expressing any opinion upon the case as originally presented, I cannot but consider that whether the principle involved is to be determined by the opinion heretofore delivered in the case or not, the rights of the parties were finally determined by that decision.

Let judgment be entered for the defendant.

KILLEY vs. SCANNELL.

Fourth District Court for San Francisco Co., Feb. T., 1858.

ATTACHMENT—REPLEVIN DEMAND AND NOTICE.

K. sold certain goods to *W.*, to be delivered in a stated number of days, payment to be made upon delivery. *W.* took possession, however, at once, and paid part of the purchase money. Prior to the time when the goods were to have been delivered, they were seized by the defendant, as sheriff, under writ of attachment issued in actions brought against *W.* *K.* commenced this action of replevin against the sheriff, but did not demand them, or notify the sheriff of his claim to them, prior to the commencement of the action.

Held, That the action could not be maintained in default of such notice or claim.

On motion to set aside the report of the referee. The requisite facts are sufficiently referred to in the opinion.

J. Clark and *A. T. Willson*, for plaintiff.

Janes, Lake & Boyd, and *Ely & Rankin*, for defendant.

A. T. Willson, for plaintiff.

The defendant, who moves for a new trial, must show some error on the part of the referee, or the new trial will not be granted, if in any view of the case which the referee could legally have taken, he was

authorised in making the report he did make. *Johnson* v. *Sepulbeda*, 5 *Cal.*, 149. The plaintiff alleges that the property is his, and proved it before the referee. The defendant justified his seizure on the ground that he seized that property as that of *Kirk & Wilson*. In proving that the property belonged to plaintiff, we may concede that he also proved that it was in *Kirk & Wilson's* possession. Can the defendant take advantage of any testimony brought out by the plaintiff, to support a defense which he has not pleaded? The only issues raised by the pleadings are, whether or not the property belonged to the plaintiff, and whether or not the defendant was justified in detaining them as the property of *Kirk & Wilson*. The reference was made to try the issues—the referee had a right to disregard any facts or testimony not bearing on the issues raised. He could not but have found in favor of plaintiff on the first issue, and the second could not have been decided differently from the first. A new trial, if awarded, must be granted upon one of the grounds mentioned in § 193, of the *code*, and we cannot see that this case can be brought under either of them.

D. Lake, for defendant.

First, Conceding that *Kirk & Wilson* were not the real owners of the property levied on, was the defendant a wrong doer in seizing the property under said process?

Kirk & Wilson were in the full possession and enjoyment of the property, using it as their own, and carrying on business in their own names, in which the property was employed. It was the sheriff's official duty to seize all property found in possession of the debtor, unless he was advised and convinced of its belonging to a third person. *Prima facie*, goods found in the possession of a judgment debtor are liable to be seized. "The goods were in the actual possession of *Webb*, who was disposing of them as owner, in the ordinary way of a retail dealer, and were therefore *prima facie* liable to the execution in the defendant's hands." *Camp* v. *Chamberlain*, 5 *Denio*, 199 and 203.

The only safe course is for a sheriff to levy on all property found in the possession of the debtor, otherwise he has the burden in an action against him, of showing affirmatively that such property was not liable

to seizure. *Camp* v. *Chamberlain*, 5 *Denio*, 199; 1 *Barn & Cres.*, 132; *Williams* v. *Loundes*, 1 *Hill*, (*S. C.*,) 595. The court says: "It was the duty of the sheriff to make the levy without any indemnity whatever, as he found the goods in the hands of the defendant in the execution, and he would not have been liable to an action as a trespasser, if he had made such levy. The goods were pointed out to him as the goods of the defendant in the execution. He was exercising acts of ownership over them—they were in his exclusive custody and possession, and the sheriff would have incurred no peril from the act of levying."

So also *Bond* v. *Ward*, 7 *Mass.*, 126: "If the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods that the officer, upon due inquiry, cannot distinguish them, the owner can maintain no action against the officer until notice and a demand of his goods," &c.

I think it may be safely asserted that a sheriff cannot be made liable as a wrong doer, unless he has done a wrong, i. e., some act that he had no legal right to do.

This action is replevin in the *detinet*, which answers to the action of *trover;* that is, it is for a wrongful detention. The original taking being lawful, the sheriff could only be guilty of a conversion by a refusal to give up the property on demand by the real owner.

It has certainly been the uniform practice at *nisi prius* to require proof of demand and refusal in such actions against the sheriff—and, as will be seen by the authorities above cited, such practice is in accordance with the settled law.

See also *Daumeil* v. *Gorham*, 6 *Cal.*, 43; *Taylor* v. *Seymour*, 6 *Cal.*, 512.

Second.—Was the property in fact, as to creditors, the property of *Kirk & Wilson.*

(Not passed upon by the court.)

A. T. Willson, for plaintiff, in reply.

This case is entirely dissimilar from those cited from 6 *Cal.* Those were actions against the sheriff for *damages* for taking the goods. Here

we claim no damages. We replevied the goods and have them. The evidence shows that they were ours.

HAGER, J.—By the pleadings it appears this action was brought against the defendant to recover possession, or the value of certain personal property, which was seized by him as sheriff, under an attachment, in a suit against a person by the name of *Wilson*, who, at the time of levying the attachment, was in the possession of the property.

Prior to levying the attachment—which was done on the 19th day of February, 1857—plaintiff in this action, by a contract in writing, had bargained and sold the property to *Wilson*, which was to be delivered to him on the 24th of the same month. *Wilson*, however, had paid a part of the purchase money agreed upon, and was in the actual occupancy and possession of the property at the time of levy.

There is no allegation or proof, on the part of this plaintiff, that he either gave notice of his claim to, or demanded the property in question of, the defendant before the commencement of this action. *Wilson* being in the possession at the time of the levy, and having, apparently, the control of tho property, was *prima facie* the owner. It was the official duty of the defendant, as sheriff, to levy on all property found in the possession of *Wilson*, as ostensible owner, and this property, under the proofs, was *prima facie* liable to be attached. If it was in fact the property of the plaintiff, or any other person, the real owner might have made his claim to it, and tried the question of title in a summary way, as authorized by our statute, or by an action of this kind.

Defendant having seized the property by virtue of his office and process, while in the possession of the party defendant mentioned in the writ, was entitled to notice and demand from the plaintiff before he can be held liable to an action for the possession or value. Neither is it necessary, as was contended on the argument, that, in order to make this defense, defendant should specially plead want of notice and demand. After defendant proved the possession was in *Wilson* at the time of the seizure, and justified under the process against him, the *onus* was on plaintiff to show affirmatively a proper demand and notice to entitle him to recover.

Report set aside, and new trial ordered.

GOULD ET UX. *vs.* ———

Ninth District Court for Siskiyou Co., March T., 1858.

SLANDER—MOTION TO STRIKE OUT.

Words accusing a party of a crime, which would subject the perpetrator to infamous punishment, are *per se* actionable.

Words not *per se* actionable, although set out as part of a conversation in which actionable words were used, will, if there be no special damages averred, be stricken out upon motion. (*Deyo* v. *Brundage*, (13 *How. Pr.* 221.) overruled.)

A husband is a proper party plaintiff in an action brought to recover damages for slanderous words spoken of the wife, although the complaint contains no allegation that he, as husband, has sustained damage.

On demurrer to the complaint for slander. The requisite facts are sufficiently stated in the opinion.

J. D. Cosby and *E. Steele*, for plaintiff.

E. H. Stone and *J. B. Rosborough*, for defendant.

DAINGERFIELD, J.—The complaint in this case sets forth as a cause of action, that the defendant called the wife, one of the plaintiffs, a "baby killer," "thereby meaning that the plaintiff *Samantha*, killed the defendant's baby, and is therefore guilty of murder;" also the plaintiff "is a whore, a damned old French whore," that "she is a liar, and a damned old perjured liar, and I, (defendant,) can prove it," "thereby meaning that she, the plaintiff *Samantha*, had been guilty of perjury, and that he, defendant could prove it;" and further alleges that "by reason of said charges she has suffered damages, by losing the confidence, respect, and society of many good and lawful citizens, and has suffered and been damaged thereby in the amount of ten thousand dollars," for which sum plaintiff prays judgment.

The demurrer assigns as causes of demurrer,

First. That the proper parties are not before the court, and that *George Gould* is not a necessary and proper party, there being no allegation that he, as her husband, has been injured.

Second. That the words are not in themselves actionable when

taken together, nor are any of them so when taken separately.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

Upon the first assignment of error in the complaint, I am of the opinion that the husband is properly joined. This was certainly so before the adoption of the *code*, and so far as the parties to an action are concerned, I consider the *code* but declaratory of the common law on this point. The husband and wife are properly joined as plaintiffs.

The next point as stated is not well made. I understand that all words are actionable *per se*, which would impute to the party concerning whom they are spoken, a crime punishable with imprisonment, or for which a party may suffer other infamous punishment. Then applying this rule to the allegations of the complaint, the crime of murder or infanticide is alleged in one count, and the crime of perjury is alleged in another, either of which would subject the accused, if true, to "infamous punishment." I therefore adjudge that the point made in the second case of demurrer as laid is not well taken.

The third and last ground is covered by the decision on the first two, and is therefore likewise overruled.

Demurrer overruled with leave to amend in — days.

(Afterwards a motion was made on the part of defendant that so much of the "complaint as charges the defendant with calling the plaintiff *Samantha Gould* with being a whore, a damned old French whore," be stricken out.)

DAINGERFIELD, J.—I am satisfied that defendant's motion should be granted. These words without any allegation of *special damage*, are not actionable. They are not so at common law, and there being no statute in *California*, subjecting a party to punishment for being a whore, unless she keep a house of ill-fame, the words are not actionable here. "Prostitution was not punishable at common law, but by statute applicable to the city of London, alone." It is true that in the case of *Deyo* v. *Brundage*, (13 *How*, *Pr.* 221,) to which I have been referred, *Harris*, J., refused to strike out the words in italic in an allegation setting out the publication of the following words:

"*Your wife is a damned Irish woman, and has got the palsy; and your son is insane*, and you are a damned thief." In his opinion, although the justice admits that "the only actionable language imputed to the defendant in the complaint, is that by which he charges that the defendant is a thief," and although he says that "it may not be *necessary* to allege in the complaint all that was said," yet he refuses to grant the motion because "no useful end could be attained by requiring the plaintiff, when preparing his complaint, to select out from the whole conversation those expressions only which involve the slanderous charge." I must disagree with justice *Harris* upon the conclusion to which he arrives, from the consideration that, as I understand the spirit of the *code*, everything which is not *necessary* is objectionable. There is no necessity for having the words in question in the complaint. It is true, that plaintiff must on the trial, "prove all that was said at the time," but I am unable to see that this furnishes any reason for its being alleged. The whole conversation must be proved, even though the actionable portion only should be set out on the complaint. The allegation then, of that portion which is not actionable, in no wise affects the case in any of its subsequent stages—it does not alter its position on the *trial*, nor the proof which can then be introduced. It stands then a simply *unnecessary* allegation upon the record. Now I do not think that the question is "if unnecessary and harmless, why should it be stricken out?" But rather, starting with the general principle that the *spirit* of our *code* contemplates conciseness, brevity and simplicity, "if unnecessary, why should it be retained?" There certainly seems to be no satisfactory answer to the question. True, it may be said, that the rights of the defendant may be saved by instructing the jury that the words are not actionable, but I can see no good reason for compelling the defeudant to protect himself by an instruction, from a charge which the law does not say is an injury, unless special damages are claimed for it. Defendant's motion is therefore allowed.

BUNNELL *vs.* WEBB.

Fourth District Court for San Francisco Co., Feb. T., 1858.

NOTICE—LIS PENDENS—BILL TO OPEN JUDGMENT.

A. obtained a judgment and decree in an action brought against *B.* to quiet title. *B.* moved for a new trial, which was granted upon condition of paying costs. *B.* appealed from the order and the appeal was dismissed. A *lis pendens* was placed on record at the time of the commencement of the action of *A.* v. *B.* Pending that action *B.* conveyed to *C.* Fourteen months after the dismissal of the appeal, *C.* filed a bill to have the judgment in *A.* v. *B.* declared void, or opened to allow him to come in and defend. *Held*, that *C.*, having taken the conveyance from *B.* with full notice of the pendency of the proceedings, (through the *lis pendens*,) could not, having failed to avail himself of his opportunity for a re-hearing, be permitted to maintain the action.

Bill filed to have a certain judgment and decree heretofore entered in the superior court of the city of San Francisco declared void and set aside, or opened to allow plaintiff to come in and defend. Upon the trial and by the records, etc., in evidence, in appeared that in 1853 certain real estate was conveyed to the wife of one *Boston*, who, with her husband, jointly executed to her grantor a power of attorney to sell and convey the same. On the 13th of February, he by virtue of the authority conferred by the power of attorney, conveyed to one *John A. Wenborn*. The power of attorney was never placed on record. Subsequent to the conveyance to *Wenborn* the attorney was lost on a steamboat, and with him the power of attorney. *Wenborn* afterwards, on the 13th of May, 1854, instituted an action in the said superior court, against *Boston* and wife, to quiet his title to the premises in question. Service was regularly made upon the defendants, the cause tried before a jury, and a verdict rendered in favor of plaintiff. At the time of the institution of the action a *lis pendens* was placed on record. Prior to the entry of a decree *Wenborn* died, and his death being suggested by his executor, *Samuel Webb*, one of the present defendants, (it does not appear whether before or after verdict,) the cause was continued, and in October, 1854, a decree was entered in his favor. In June, 1854, after the commencement of the action and the filing of the *lis pendens*, but prior to the trial, *Boston* and wife

conveyed their interest to one *David Calderwood.* On Nov. 6th, a motion was made on behalf of *Boston* and wife to have the judgment and decree vacated, and for leave to come in and defend. The motion was based upon the affidavit of *Boston* and *Calderwood*, to the effect that the former was absent at the time of the trial, and that the latter, as agent of the former during his absence, had mistaken the trial number of the case, and had therefore not appeared to defend it. The motion was granted, and a new trial ordered upon payment of costs. The costs were not paid, but defendant appealed to the supreme court. The appeal was, at the —— term of that court, 1855, dismissed, on the ground that the court below had granted the proper relief, to wit, a new trial. No further proceedings were had.

On the 8th March, 1855, *Calderwood* conveyed a one-half interest in the premises to *Hutchinson*, and on the 12th of November of the same year, he conveyed the remaining one-half interest to *Scott*. *Scott* and *Hutchinson* convey to plaintiff *Bunnell* on the 12th of July, 1856.

Samuel Webb, as executor of *Wenborn*, conveyed in February, 1856, to one *Haynes*.

Bunnell, on the 25th Sept. 1856, filed this bill, making *Webb*, *Boston* and wife, and *Haynes*, parties defendant, to annul the judgment and decree of the superior court, or to have it opened and be allowed to come in and defend.

W. W. Crane, for plaintiff.

The only issue of fact presented by the pleadings is, whether plaintiff has any interest in the premises in controversy. The allegation in the complaint that *John A. Wenborn* died on the 3d or 4th of June, 1854, is not denied, and it was therefore unnecessary to introduce witnesses to prove the time of his death, although it was done.

First. Has the plaintiff any interest in the land? That he has, is thus established:

I. Both plaintiff and defendant claim through *Boston* and wife. *Wenborn*, in his complaint in the superior court, alleges, "that defendants (*Boston* and wife) on the 12th day of February, 1854, by

their attorney in fact, *John Stratton*, by deed of that date, (recorded, &c.) conveyed to plaintiff the above described real estate," (the premises in question.)

II. The deed from *Boston* and wife to *Calderwood*, dated June 3d, 1854.

III.(*a*) The deed from *Calderwood* to *Hutchinson*, dated Dec. 12, 1855; (undivided half.)

III.(*b*) The deed from *Calderwood* to *Scott*, dated March, 1856; (undivided half.)

IV. Deed from *Hutchinson* and *Scott* to plaintiff, dated July 24th, 1856.

Second. Can *Bunnell*, whose name does not appear upon the record of the suit of "*Wenborn* v. *Boston*," but claiming through *Boston* an interest and title to the land then in controversy, maintain this to set aside the judgment in that action? He can.

I. Because the alienation of the property was voluntary, and made when a *lis pendens* was on file, and *Bunnell* took with notice.

II. Because, even if no *lis pendens* was on file, being an assignee *pendente lite*, he is concluded by the decree. The plaintiff may make him in name as he is in fact, a party to the record. *Story Eq. Plea.*, §§ 342, and 409, and authorities cited. *Garhell* v. *Dallain*, 2 *Ball & B.* 167; 3 *Ves.* 314; 11 *Ves.* 104; 2 *Ark.* 174; *Murray* v. *Ballou*, 1 *Johns Ch.* 566; *Sedgwick* v. *Cleveland*, 7 *Paige*, 290; Chancellor *Jones*, in his opinion in *White* v. *Carpentier*, (2 *Paige*, 254,) says: "It is perfectly well settled that a decree in a suit can bind none but those who are parties, or acquire their rights from a party after the service of the subpoena and pending the suit."

III. Because all persons having an interest in the cause, either as devisees, remainder men, or purchasers, are aggrieved by the particular errors assigned in the decree, and may file a bill of review. *Story Eq. Plea.*, § 410.

IV. Because *Bunnell*, being in privity with *Boston* and wife in the judgment or decree, cannot attack it collaterally in any action where it may come in question. His only course is by an adverse proceeding to set it aside; and this is true, though the judgment is void, as it is only void in consequence of something *dehors* the record. *Griswold* v. *Stewart*, 4 *Cowen*, 457.

Third. The verdict and judgment having been taken after the death of *Wenborn*, are absolutely void, 3 *Black.'s Com.* 308, and *n* (10); *Cooper* v. *Johnson*, 2 *Barn & Ald.*, 394; *Taylor* v. *Harris*, 3 *Bos. & Pul.*, 549; *Code*, § 16.

Fourth. Although "the death of *Wenborn* was suggested upon the record," (admitting that it was so suggested by the statement in the decree signed by the judge, "that the cause was continued in consequence of the death of plaintiff,") yet this was—

I. Not an error apparent upon the face of the record, because a party dying between verdict and judgment, the latter is good even if entered in his name, *code*, § 202; and all intendments being in favor of the regularity of the judgment, the court, to sustain it, will presume that the death occurred after verdict, until the contrary is proven.

II. The only mode formerly of continuing a suit after the death of a plaintiff, was by bill of review, *Story Eq. Plead.*, § 354. Our *code*, § 16, says, "the court, on motion, may allow the cause to be continued by or against his representative or successor in interest," which means that it must be *in the name* of the representative. In this case the final judgment is in the name of *Wenborn*.

Fifth. It is urged our bill was filed too late. But this is not a bill of review for errors apparent upon the face of the record, but because of constructive fraud in entering a judgment predicated upon a verdict in favor of a then deceased plaintiff. *Story Eq. Plead.*, § 419, 426-7.

Sixth. The plaintiff had not a complete remedy at law; for, claiming through a purchaser *pendente lite*, he takes subject to the effect of the decree.

H. S. Love, for defendants.

First. Plaintiff *Bunnell*, cannot have the action of *Wenborn* v. *Boston et ux.*, re-tried or re-heard, because he was not a party to that action. No collusion is alleged between *Boston* and wife, and *Wenborn;* the former do not complain of the judgment and decree taken against them—they are made parties defendant here. A party to an action can only have a case re-heard on the ground of surprise, or

fraud practised upon him by the other party. But *Bunnell* stands here in reality, as a mere stranger, because, not being an actual party to the former action, his title is not affected by the proceeding, and therefore his remedy at law is complete. If he owns the land in controversy he may bring ejectment, and—his title never having been questioned—he having no opportunity to be heard in the action against *Boston* and wife—he, in short, not having been a party to that proceeding—his rights rest, upon whatever merit they may possess, unaffected by the judgment rendered in that case.

Second. The court in which the former action was pending, gave the defendants in that action all the relief which the plaintiff seeks in this. A new trial was granted; he had therefore the right to have that action re-heard; it is true that the court imposed costs as a condition; that was in the discretion of the court, and this court will not interfere with the exercise of the discretion of a court of co-ordinate jurisdiction, and that too, in a case where it was unquestionably properly exercised; *Boston* and wife asked to be relieved against a judgment which was rendered against them through inadvertence or their own neglect; the court properly imposed costs; they had their right of appeal and exercised it, and the judgment of the court below was affirmed.

Third. If, as plaintiff contended, no suggestion of *Wenborn's* death was made upon the record, or entered thereon, and the proceedings were therefore irregular, they should have taken an appeal upon that ground, and have had the proceeding reversed. If the error did not appear upon the face of the record, and did nevertheless exist, they should have moved the superior court to set aside the proceedings for the irregularity, and upon a refusal by that court, they had their right of appeal. For every irregularity in a proceeding at law, which the party could have remedied in the court in which the proceeding was pending, it is not to be tolerated that, so long afterwards as he has attempted it in this case, he should be allowed to seek his remedy in a court of *equity*.

Fourth. But the objection that the death of *Wenborn* was not suggested upon the record does not exist, for the recital in the decree is sufficient; "This action having been continued in consequence of

the death of plaintiff, by his executor *Samuel Webb*, and the jury having found a verdict for the plaintiff, now therefore it is ordered, &c." The proceedings in the superior court will be presumed to be correct until the contrary is shown. The suggestion is sufficient between the parties to the action, and *a fortiori* as to third parties.

Fifth. Plaintiff contends that the decree is void, and is a cloud upon his title. If void, it cannot well be a cloud, but he has shewn no title, for he has not shown any possession in himself, or any title or possession in *Boston* and wife, through whom he claims. He has not shown that any of the defendants claim title to the premises, or that they are in possession. *Webb* disclaims all interest, and *Haynes* does not set up any, and none is shown. There is no proof of the death of *Wenborn*, except what appears from the suggestion upon the record, and if that shows the fact, then plaintiff has nothing to complain of.

In any view of the case, the party had an adequate remedy at law.

D. Rogers, for defendant.

If the plaintiff had any rights or remedy they are lost.

The present proceeding is a bill of review, brought some twenty months after the enrolment of the decree. The time for an appeal had passed at the time of the filing of this bill, and therefore the bill will not lie. *Story Eq. Plead.*, § 410, and cases there cited; *Boyd* v. *Vanderkemp*, 1 *Barb. ch.*, 273; *Buckner* v. *Faker*, 7 *Dana*, 50. In the case of *Smith* v. *Clay*, (*Ambl.*, 745; 3 *Bro. Ch. Cas.*, 639,) *Lord Camden* stated the principle, that "as the court of chancery has no legislative authority, it could not properly define the time of bar by a positive rule; but that, as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity." Equity gives the same effect to statutes of limitation, as that which they receive from courts of law. *Lewis* v. *Marshall*, 1 *McLean*, 16; *Lewis* v. *Marshall*, 5 *Peters*, 460; *Bank of U. S.* v. *Daniel*, 12 *Peters*, 35; *Sharp* v. *Sharp*, 16 *Verm.*, 105; *Murray* v. *Coster*, 20 *Johns.*, 576; *Lansing* v. *Starr*, 2 *Johns. Ch.*,

150; *Kane* v. *Bloodgood*, 7 *Johns. Ch.*, 90; *McCrea* v. *Purmort*, 16 *Wend.*, 460; *Humbert* v. *Trinity Church*, 24 *Wend.*, 587; *Watkins* v. *Harwood*, 2 *Gill & J.*, 307.

HAGER, J.—This action is in equity brought for alternative relief, either to set aside and annul a judgment and decree of the superior court, in an equity action of *Wenborn* v. *Boston* and wife, or to open the same and make this plaintiff a defendant therein.

This plaintiff is not a party to the judgment and decree attacked, but claims as a privy in estate with, and as grantee of *Boston* and wife, to have an interest in the subject matter of the controversy.

Wenborn's action was instituted May 13, 1854, for the purpose of determining and silencing an alleged claim of *Boston* and wife to certain real estate purchased by him from them, which arose out of the circumstance of some deed being lost and unrecorded. At the time of the action a *lis pendens* was placed on record, according to the statute, and, *pendente lite*, *Boston* and wife, on the 3d June, 1854, as is claimed by plaintiff, conveyed the property to *Calderwood*; it was subsequently conveyed to other parties, until finally, on the 21st of July, 1856, it was conveyed to this plaintiff.

Calderwood and plaintiff respectively purchased with full notice of the action of *Wenborn*, and of all proceedings had therein up to the period of their respective purchases, and in this action they are in no better position than *Boston* and his wife would be had this suit been instituted by them.

On the 10th October, 1854, a judgment and decree was rendered in favor of *Wenborn*, and against *Boston* and wife, substantially to the extent of the relief prayed.

Subsequently a motion to open the judgment, and for a new trial was made. I find of record a statement of the grounds, etc., relied upon in support of this motion, which was filed October 27, 1854, and is signed by the attorney of *Boston* and wife and by *Calderwood*, who had prior to that time, received his conveyance, as agent of the defendants. This statement also contains an affidavit made by *Calderwood*, which was used in support of the motion. It appears then, that *Calderwood* purchased prior to the trial and judgment, and had notice

of the action through the recorded *lis pendens*, and that at the motion for a new trial, he participated therein as the agent of *Boston* and wife. Under our *code* of practice, it was his privilege to have intervened in the action in behalf of his own interest, and if he had desired to protect his rights he would have done so. In default thereof, he can have no good reason to complain, nor can his successor in interest, that *Boston* and wife did not properly defend the action. Why should they have done so, when they had conveyed all their interest to *Calderwood*, who had purchased with notice of the pendency of the action.

The motion for opening the judgment and a new trial was granted, upon payment of costs. An appeal was taken by *Boston* and wife to the supreme court, which was dismissed on the ground that the inferior court had granted all the relief sought. The condition of granting the rehearing—the payment of costs—was not complied with, the costs never having been paid. It was a condition precedent, and therefore the judgment stands as it was originally entered, and this plaintiff is a purchaser with full notice of it and all the proceedings had in the action, and is in no better condition, and is entitled to no more favorable consideration, than would be *Boston* and wife, if they had retained their interest and were plaintiffs here.

It then remains to be seen whether, if *Boston* and wife were the plaintiffs—

1st. The judgment is void, and should be set aside; or,

2d. It should be opened, to allow them or this plaintiff to defend.

As I have stated, *Boston* and wife had a complete remedy by the re-hearing ordered, and if necessary, by an appeal to the supreme court in the other action, which if they had availed themselves of—and there is no excuse given why they did not—this action would have been unnecessary. If the action and judgment of the superior court had been at law, and *Boston* and wife still retained their interest in the property, and had instituted this action, no sufficient case appears by the pleadings and proofs, to authorize a court of equity to interfere and open the judgment, and grant them a re-hearing or new trial. This plaintiff, as their successor in interest, having purchased

with notice, is certainly entitled to no greater consideration, when he invokes the aid of this court in their and his own behalf.

The complaint must be dismissed, and judgment entered for defendant with costs.

WHEELER *vs.* MANLOVE.

Sixth District Court for Sacramento Co., April T., 1858.

REPLEVIN—MINING CLAIM.

A complaint in *replevin*, which alleges that defendant took and retains an undivided interest in a mining claim, held insufficient upon demurrer.

A mining claim, being an incorporeal hereditament, is not the subject of seizure or *replevin*.

On demurrer to a complaint in an action of *replevin*. The necessary facts are stated in the opinion.

The names of counsel have not been furnished.

BOTTS, J.—The plaintiff alleges that the defendant wrongfully took and detains from him certain household and kitchen furniture, mining tools, a building and *an undivided interest in a mining claim;* all of which, he alleges, are worth twenty-five hundred dollars; he prays judgment for a return of the property, or its alternative value, with damages for the detention. The defendant demurs, upon the grounds of the improper union of several demands, and because the complaint does not state facts sufficient to constitute a cause of action.

Upon the latter ground, it seems to me, the demurrer must be sustained. The plaintiff alleges an impossibility, viz: that the defendant took and detains an undivided interest in a mining claim. A mining claim is an incorporeal hereditament that is incapable of seizure and detention; and it certainly could not be made the foundation of an action of replevin. This allegation might therefore, be treated as surplusage, and the plaintiff might recover for the personal property capable of seizure and detention; but of the value of

this property, separately, there is no allegation, and there is, therefore, nothing to show that the plaintiff is entitled to redress in this form.

The demurrer is sustained.

I will take the liberty of reprehending the practice of submitting questions of this character to the court without argument, or brief, or authority. It is to cast the labor properly devolving on counsel, upon the shoulders of the judge. It is neither just to the client nor to the court.

BURKE *vs.* HOUSEMAN, TAX COLLECTOR.

Sixth District Court for Sacramento Co., March T., 1858.

TAX-SALES—INJUNCTION—PUBLICATIONS.

Where the sheriff's deed under a tax-sale is made *prima facie* evidence of title in the purchaser, it would become, if it were illegal, (owing to any insufficient compliance by those whose duty it is to make the sale, with the requirements of the statute regulating the same, or by reason of any other cause,) a cloud, which a court of equity will interpose to prevent.

A provision in a statute regulating the collection of taxes, which requires the publication of the delinquent tax list in some newspaper, or in a supplement to such paper, is not sufficiently complied with unless the supplement be circulated as extensively as the paper itself.

On demurrer to a bill in equity filed to restrain the defendant, a tax collector of Sacramento county, from proceeding to sell certain real estate, the property of plaintiff, on the ground that the sale will be irregular, unauthorized and void; but that a deed executed under such sale will be a cloud upon plaintiff's title to the premises in question.

The necessary facts are reported in the opinion.

The names of counsel have not been furnished.

BOTTS, J.—The plaintiff alleges that the defendant threatens, and is about, to sell certain property belonging to the plaintiff for taxes claimed to be due to the city of Sacramento. This threatened sale is alleged to be illegal in several respects. The plaintiff prays for a

perpetual injunction. To this bill the defendant demurs, on the ground, first, that for any injury to result from the threatened sale, the plaintiff has an adequate remedy at law; and, secondly, that the irregularities complained of would not invalidate the sale.

As a general rule, equity will not interfere to prevent a sale of real estate by any one pretending to have an interest in the property; because, it is said, if the vendor have no title, none will pass, and no injury will be sustained. But, where the vender, by a sale to an innocent purchaser, might defeat an equity of the plaintiff, the court would always interpose to preserve the equity. Again, courts of equity will interfere to prevent, or to remove, a cloud on the title to real estate. A cloud may, perhaps, be defined to be an apparent but not a real title, one which might inequitably annoy the real owner. But under ordinary circumstances, tax sales present no such features as these; and, consequently, they have been repeatedly held to afford no ground for interposition by injunction. This was the doctrine of the supreme court in *De Witt* v. *Hayes*, (not reported,) and in *Minturn* v. *Hayes*, 2 *Cal.*, 590. But, in *Palmer* v. *Boling*, decided 6 *Cal.*, Oct. T., (not reported,) the supreme court—a full bench, too—declare, that since the sheriff's deed under a tax sale is made *prima facie* evidence of title, it would become, if the sale were illegal, a cloud which a court of equity should interpose to prevent; expressly stating that, to such a case, the doctrine of *De Witt* v. *Hayes* is inapplicable. In *Palmer* v. *Boling*, although it was admitted that a threatened tax sale might afford ground for injunction, the court held that there was no illegality in the proceedings complained of. Upon this point, the plaintiff obtained a rehearing; and upon the rehearing, the court—*Palmer* v. *Boling*, (7 *Cal.*, Oct. T.)—re-affirmed their former decision, giving additional reasons for sustaining the proceedings complained of. If the court had changed their opinion upon the nature of the remedy, as the counsel for the defendant supposes, they would hardly have delivered an elaborate opinion on the merits of the particular case. That courts of equity will, then, in proper cases, interfere to prevent tax sales, I take to be the settled law of the land. Is the case at bar such a case?

I shall notice one only of the several irregularities complained of;

because it appears to me to be a substantial defect, that, if it really exist, would invalidate the title of the purchaser. It has been repeatedly and invariably held, that such sales, to be valid, must be preceded by the requirements of the law. The Act directs the publication of the delinquent tax list in some newspaper published in the county, or in a supplement to such paper. This requirement must be strictly complied with. If the list be printed in the body of the paper, it would, of course, be circulated as extensively as the paper itself. To have printed the list in one copy of the paper, and to have omitted it in all others, would not have satisfied the requirements of the law; this would have been to "print," but not to "publish." When the law authorized the publication upon a separate piece of paper, it never was intended to limit the publication. I think there can be no doubt that it was contemplated that the list, whether printed in the body of the paper or on a separate sheet, should be circulated as widely as the paper itself. To fail to advertise as the law directs, is to fail to advertise at all; and without advertisement, the sale would be, clearly, invalid. Now the bill alleges that the list was printed in a supplement to a newspaper called "*The Daily Bee*," and that said supplement was not circulated as extensively as the newspaper itself; and that the said publication was not made for the time prescribed by law. A sale effected under such circumstances would cloud the title of the owners; and the homely saying, that "an ounce of prevention is better than a pound of cure," has ever been a favorite doctrine of the court of chancery.

As to the homily in the defendant's brief upon the *moral* obligation resting upon all good citizens to pay their taxes, whether legally or illegally exacted, I have only to say, that there is a future and higher court, in which that part of the case may be considered.

The demurrer is overruled.

HILL vs. KING.

Eleventh District Court for Placer Co., April T., 1858.

WATER COURSES—MINING DITCHES—PRIOR APPROPRIATION.

A. appropriated the waters of a certain stream, by turning them into his ditches, and through them, into his reservoirs. *B.* located above *A.*, and emptied the waters of a *different stream*, mixed with large quantities of earth and sediment, into that appropriated by *A.* By reason of this *A.* suffered damage in being put to expense to clean out his ditches—in obtaining a decreased supply of water—and by loss of custom arising from its deteriorated quality. *A.* brought this action against *B.*, to recover damages for the said injury.

Held, That *A.* had a right to recover.

This was an action to recover damages for the injury of water, caused by the mixing of dirt and soil in the water, by using it for mining purposes. The cause was tried by the court, who found the following as the facts of the case, from the pleadings and evidence.

From December 1, 1855, plaintiff's intestate, was the owner of two water ditches, leading from "Indian Cañon" to Bird's Flat, and other mining localities, which ditches were constructed in 1852, to convey the water of said cañon to said localities, for mining purposes.

The defendants are owners of certain mining claims in Indian Cañon, and from the 1st day of December, 1855, to the commencement of this suit, they have washed and sluiced off from their mining claims large quantities of soil and gravel, into the bed of Indian Cañon, at a point about 320 rods above the heads of plaintiff's ditches, by means of water used in their mining operations, brought by them from another stream, not connected with the waters of Indian Cañon. This causes material injury to the plaintiffs, by thoroughly impregnating the water of Indian Cañon with dirt and sediment, which is immediately washed down in large quantities into the plaintiff's ditches, and being deposited in them, materially obstructs the flow of water through them, and materially reduces their capacity for the conveyance of water. In consequence of this muddying of the water, plaintiff's customers have also withdrawn their patronage, which has greatly reduced the receipts from the sales of water. Plaintiff is also compelled to incur great ex-

pense in clearing the mud and sediment from the ditches and reservoirs, nearly equalling the entire receipts. Such muddy water also flows in ditches with the usual grade with much less rapidity than clear water.

Defendant's claims could have been worked by tunneling and drifting, without the necessity of sluicing or washing off a large portion of the soil which has been washed down by the mode pursued by the defendants; but such way of working the claims would have involved a a much greater expense, and such expense would nearly equal the profits, while by working them as defendants have done, they have realized a large profit on the labor and capital expended. If the claims had been worked by tunnels and drifts, very little injury would have resulted to the plaintiff.

The court found that the plaintiff had been damaged as follows: On account of mud, sediment, &c., deposited in his ditches, $883; on account of the flow of the water in the ditches being impeded, thereby depriving the plaintiff of as large a supply as would otherwise have flowed through the ditches, $225; on account of the decreased value at which plaintiff was compelled to sell water, in consequence of the mud and sediment with which it was mixed, $100.

The names of counsel have not been furnished.

HOWELL, J.—This case has been once appealed to the supreme court, where the judgment of the court below was reversed, and the cause remanded. *Hill* v. *King*, 7 *Cal.*, July T. Subsequently a rehearing was granted, and the doctrine as laid down by the late chief justice, that the prior appropriator of the waters of a stream is entitled to their "exclusive use, pure and undiminished," as they were at the time of their appropriation, was modified so as to conform to the rules established in the case of the *Bear River, &c., Mining Co.* v. *York Mining Co.*, 7 *Cal.*, Oct. T. In the latter case plaintiffs made the first location on the stream, and subsequently the defendants diverted a part of the waters of the same stream at a point above, mixed with them large quantities of soil and other foreign substances, and in this adulterated state turned them back into the stream again, before they

reached the head of plaintiff's ditch. Justice BURNETT, in delivering the opinion of the court in that case, says that, "after the most careful and anxious consideration of this most difficult subject, the following conclusions occur to me as the most practicable approach to a fair and equitable adjustment of this matter. 1st. The ditch owner is entitled to have the water flow without material interruption in its natural channel. This right would seem to be compatible in general with the fair use of the water. 2d. He is entitled to the water so undiminished in quantity as to leave sufficient to fill his ditch as it existed at the time the locations were made above. This right is essential to the protection of the ditch owner. If we lay down the rule that the subsequent locator above may use the water so as to diminish the quantity, it would be difficult to set any particular limits to such diminution, and ditch property might be rendered entirely worthless. As the water cannot be absorbed or evaporated but once, the ditch owner should be entitled to its exclusive use in such case. 3d. And as to the deterioration in quality, the injury should be considered as an injury *without consequent* damage."

The facts of that case were precisely the same as in this in regard to the adulteration of the water, with this exception. In the *Bear River* case, the water was taken out of the stream on which plaintiff's ditch was located, deteriorated, and then returned before reaching the head of plaintiff's ditch. Here it is brought from a different stream from the one on which plaintiff's ditch is located, and these foreign waters, in their adulterated state, are poured into Indian Cañon, and are thence carried into plaintiff's ditches cnd reservoirs. Is there any difference in principle between the two cases? In the *Bear River* case, the court has treated the right to use the water of the streams on the public lands, as a *bounty* from the government to her citizens, and was governed, it seems, in arriving at its conclusions, by a disposition, or rather desire, to distribute this bounty in such a way as to benefit the greatest number of persons, and thereby develope, as rapidly as possible, the resources of the mineral region. And "keeping this position in view," they proceed "to examine the questions in the case." If these considerations have governed the supreme court in adjudicating

such questions, then the district courts are equally free to exercise their judgment in cases where the facts are different. In all the decisions upon questions involving the right to use the water of streams in the mining districts, the supreme court has been careful to preserve the rights of the first appropriator, so far as their exercise may be in accordance with the protection and encouragement of others. The greatest innovation upon the prior rights of ditch owners made in the *Bear River* case, and I am not disposed to carry the doctrine further than was done in that case, for in my judgment it will be found that the rule, that the adulteration of the water is *damnum absque injuria*, as broadly as it is there laid down, will have to be modified.

One of the chief reasons that operated upon the court, in holding that the prior locator was not entitled to have the water flow in its pure state, as it was wont at the time of the location of his ditch, and that the adulteration was an injury without consequent damage, was the consequences that would flow from such a rule. For the court very justly remarks, that if a rule of this kind were established, the ditch owner who takes from a stream one tenth of its volume, could prevent all others subsequently locating above him from using the other nine tenths, for the reason, that in doing so the whole body would become adulterated. But these consequences do not necessarily follow in a case like the one at bar. The defendants are adulterating the waters of another and entirely distinct stream, and the only necessity that grows out of their use, is in finding a place to discharge them. And if the plaintiff's rights must yield to this necessity, why not allow the defendant, if it should prove more convenient, to discharge them directly into plaintiff's ditches and reservoirs? In my judgment the reasoning of the court in the *Bear River* case, and the principles upon which its judgment is founded, are inapplicable in this. It may be that parties occupying the position of the defendants, will sometimes find it inconvenient to get rid of the water after it has been used; but these considerations will not justify the courts in the establishment of a rule that would prove utterly destructive of the rights of other parties, who are equally entitled to their protection.

For the above reasons I am of the opinion that the injuries resulting

from the acts of the defendants are not *damnum absque injuria*, but that the plaintiff is entitled to recover the damages as found by the court.

Let judgment be entered accordingly, and for costs.

FIELD vs. FIELD.

Fourth District Court for San Francisco Co., Feb. T., 1858.

SERVICE OF PROCESS—JURISDICTION.

Service of summons merely, without serving a certified copy of the complaint, is not sufficient of itself, under our statute, to give the court jurisdiction in the action, and of the defendant.

This was an *ex parte* motion for a decree of divorce, upon the report of a referee.

J. C. Stebbins, for plaintiff.

Defendant not in court.

HAGER, J.—By the sheriff's return it appears he personally served the defendant with a copy of the summons. It does not appear that a copy of the complaint has been served, as is required by our *code*, and the defendant has not appeared in the action.

Until the summons and complaint are served as required by statute, or the defendant appears, (*code*, § 35,) the court acquires no jurisdiction, and all proceedings in the action are void.

Plaintiff may have leave to complete the service of the summons and complaint.

RANDALL vs. RANDALL.

Fourth District Court for San Francisco Co., Feb. T., 1858.

DIVORCE—DESERTION—FAILURE TO SUPPORT.

A divorce will not be granted on the ground of desertion on the part of the husband, and that he has, for two years next preceding the institution of the action, failed to supply the wife with the necessaries of life, having the ability so to do, provided it appears that, in the first instance, she deserted him, and never thereafter returned or offered to return.

Reynolds, for plaintiff.

HAGER, J.—This action is brought to obtain a divorce, on the grounds that defendant has deserted plaintiff, and failed to supply her with the necessaries of life, having the ability so to do. Defendant made no appearance or defense, and the case was referred to take and report proofs.

Upon examining the report of the referee, it appears by the testimony of plaintiff's mother that plaintiff left her husband's, and went to her mother's house, to reside. This indicates that the desertion was on the part of the plaintiff, instead of the defendant.

It does not appear that they resided together after that separation, and defendant left this state and now resides in the state of *Maine*.

As a general rule a husband is not bound to support his wife, or to furnish her with the necessaries of life, if he has the ability, at any other place than his own home, unless she is absent with his consent, or is justified, for good cause, in leaving him. It does not appear, after she left her husband, that she returned or offered to return to him. Had she done so, he might have received her; if he had refused t do so, then, perhaps, after the time limited, and under our statute, plaintiff would be entitled to a decree in her favor. Upon the testimony reported, the divorce must be denied.

Decree accordingly.

SEARS vs. HATHAWAY.

Fourth District Court for San Francisco Co., Feb. T., 1858.

NEW TRIAL — EXCESSIVE DAMAGES.

Ordinarily, courts will not interfere with verdicts for damages, unless they are grossly or outrageously excessive.

Where the damages awarded are grossly excessive, the court may either grant a new trial, or order, that unless plaintiff stipulate to enter judgment only for such a sum as would be supported by the evidence, the new trial will be granted.

In determining the latter sum, the court will not substitute its own views entirely for those of the jury, but will be guided, in some degree, by their verdict.

On motion for a new trial. The necessary facts are referred to in the opinion.

E. Cook and *E. D. Sawyer*, for plaintiff.

Pixley & Smith, for defendant.

HAGER, J.—This action was brought to recover damages alleged to have been sustained by plaintiff for his malicious prosecution and imprisonment by the defendant. It was tried before a jury, when a verdict was rendered in favor of plaintiff for $4,000. 1 *Cal. D. C.*, 305.

The defendant moves for a new trial, principally on the ground that the damages awarded are excessive.

Ordinarily, courts will not interfere with verdicts unless they are grossly or outrageously excessive. It is a delicate matter, at all times, for a court to set aside a verdict of a jury on the ground that their opinion is not in accordance with the views of the court; but sometimes cases occur when it becomes the duty of a court to do so, to prevent injustice being done through mistake, prejudice, or passion, or by an award of grossly excessive damages.

I distinctly remember the facts proven on the trial, and that I was greatly surprised at the amount of the verdict, when it was pronounced. Had it been for $500, instead of $4,000, it would, in my opinion, have been more appropriate, amply sufficient, and as much as the testimony would justify. I do not desire, however, entirely to

substitute my own views for those of the jury, to take the place of their verdict; but I consider it my duty to order, that unless plaintiff stipulates to take judgment for $2,000, instead of the amount of the verdict, that a new trial be granted on the ground of grossly excessive damages.

Plaintiff gave the stipulation as indicated by the court, and the new trial was denied.

LEWIS vs. WINSTON.

Sixth District Court for Sacramento Co., April T., 1858.

BILL IN EQUITY—CONVEYANCE.

A., through his attorney in fact, conveyed certain real estate to *B.*, prior to the passage of the statute concerning conveyances. Subsequent to the execution of the conveyance, the power of attorney executed by *A.* to his attorney was destroyed, without ever having been placed on record. *B.* filed a bill in equity, alleging these facts, and praying that *A.* be decreed to execute to him another conveyance, confirming the act of his attorney, or that a commissioner be appointed to do so. *Held*, that the plaintiff having received a conveyance, perfect and sufficient at the time of its execution, could not maintain the suit.

Bill filed in equity to compel defendant to execute and deliver to plaintiff a perfect conveyance of certain real estate, alleged to have been heretofore by him, by his attorney in fact, conveyed to plaintiff, but defectively, owing to the loss or destruction of the power of attorney, which had never been placed on record.

The necessary facts are given in the opinion.

The names of counsel have not been furnished.

Botts, J.—The bill of the plaintiff alleges, and the evidence shows, that the plaintiff purchased of the defendant, certain lots in the city of Sacramento, in August, 1849. The defendant, by deed of that date, by *P. M. Scoffy*, lawfully authorized by a written power of attorney thereto, executed good and sufficient deeds to the plaintiff. The power of attorney was burnt while in the possession of *Scoffy*,

and has never been recorded. Deeds properly acknowledged, so that they may be admitted to record, have been demanded, and he refuses to execute them unless the plaintiff will pay him the further sum of twenty per cent. upon the present value of the property. The original purchase money was fully paid by the plaintiff. The bill prays that the defendant be decreed to execute a deed, properly acknowledged, confirming the act of his attorney, or that a commissioner may be appointed for that purpose.

When the plaintiff paid his money, he got all he bargained for, or required. No deception was practised upon him; no concealment is pretended; he knew that the power of attorney was not recorded, and he might have declined the purchase on that account. He can hardly ask the court to protect him against the consequences of his own folly. If this had been a bill to perpetuate the evidence of the authority of *Scoffy*, it might have met with a different reception at the hands of the court. But it is urged that the plaintiff was guilty of no folly; that the threatened injury from which he begs to be saved, arises from a subsequent act of the legislature, by which his property might pass into the hands of a subsequent purchaser, if not recorded; and that his title, although perfect at the time, is not such as can be recorded under the act. If the legislature should pass an act, by which the property could be retained by the owner, only upon the contingency of an impossible condition, there could not be much doubt about the constitutionality of such an act. At any rate, I know of no precedent for compelling a vendor of real estate to do more than was necessary at the time of the sale to pass a full and perfect title to the vendee.

But in truth the plaintiff has sustained, and, with due and proper vigilance, could sustain, no injury by the statute aforesaid. True it is that the supreme court, both in *Stafford* v. *Lick*, (7 *Cal.*, April T.,) and in *Call* v. *Hastings*, (3 *Cal.*, 179,) held that the statute operated equally upon the deeds made before and after the statute; but, in saying so, they uphold the constitutionality of the statute upon the very ground that, under the forty-first section, (*Wood's Cal. Dig.*, 104, *art.* 378,) all deeds, good in themselves, executed prior to the

passage of the statute, might be recorded without the formalities prescribed for subsequent conveyances.

The plaintiff having his remedy in his own hands, the prayer of his complaint must be denied. Let judgment be entered for the defendant.

PEOPLE vs. WHITHURST.

Fourth District Court for San Francisco Co., Feb. T., 1858.

REASONABLE DOUBT—TESTIMONY—MEDICAL AND SURGICAL TREATMENT.

By reasonable doubt is not meant a mere suspicion that the defendant may be innocent or guilty, or that any theory of the prosecution or defense may be correct; the question is, rather, after a full consideration of the whole testimony, is the understanding directed, the judgment convinced, so that the mind has arrived at a conclusion; or do such doubts exist that the mind remains unsatisfied.

Malice aforethought, and malice express and implied, defined.

The credit of witnesses may be impeached by a cross examination; by disproving their statements by other witnesses; by general evidence affecting character for morality, truth, and veracity; and by proof that the witnesses have made statements contrary to those testified to, in regard to matters relevant to the issue.

If testimony is conflicting and irreconcilable, a jury may adopt or reject any portion of it, and ascertain the facts according to the reasonable probabilities of truth, or as the preponderance of the testimony may indicate, or convince the judgment.

If death is occasioned by grossly erroneous medical or surgical treatment, and not by the wound itself, the defendant is not answerable; but if it results merely from a want of the higher professional skill which is obtainable in populous cities, but not accessible where deceased was treated, the defendant, for that reason, is not excused or held innocent.

If the operation of *trephining* was required for the proper treatment of the deceased, and it was performed with ordinary skill, and death ensued, as a direct or indirect consequence, the defendant is not released from responsibility.

If it was known that the operation would give a chance of saving life, and it had not been performed, it might have been contended in defense that deceased died from the incompetency or neglect of his medical attendants.

If, during any necessary remedial treatment or operation, unforseen and usual causes cut short life, no exculpation should be admissible to attack the best directed efforts for the preservation of life.

If an operation is unnecessarily performed, the responsibility of the defendant would cease, if the death could be clearly ascribed to it; but if it be necessary, and be performed with proper skill, and some other resulting disease destroys life, the defendant would be differently situated.

If doctors learned in medicine and surgery, disagree as to the treatment and remedy, a uniform rule cannot be adopted by the practitioner that all would pronounce proper; but he will probably be condemned by the one school opposed to, and supported by the other, favoring it. In such case it is not a question whether medical skill might have saved life, or whether the surgeon did or did not pursue the proper remedy; but what was the cause of death, and were available and proper means used to preserve life.

This was an indictment found against *Marion Whithurst*, as principal, and *William Roberts* and *Charles Bearss*, as accessories, charging them with them urder of one *A. A. Mason*, at the town of Michigan Bluffs, Placer county. The case was transferred for trial to San Francisco city and county. The defendants pleaded not guilty, and demanded separate trials.

On the 12th of May, 1857, deceased received a blow on the forward part of the left side of his head, which was charged to have been inflicted by defendant, *Whithurst*, with the barrel of a pistol, and that the other defendants aided and assisted. On the day following the blow, *coma*, and compression of the brain ensued, and the operation of *trephining* was performed. The deceased lingered, without change for the better, until the 20th of the same month, when he died. A great deal of testimony was introduced which it is unnecessary to state, inasmuch as but little more of the charge is given, than such portions as present the questions of medical jurisprudence, and as refer to the surgical and medical treatment. The facts relating to these questions are sufficiently stated in the extract given from the charge of the court.

The issues raised on the part of the defendant were, first, as to the fact, of whether deceased came to his death from a blow inflicted by *Whithurst*, or one of the accessories—and second, whether the death was caused by the blow, or by insufficient and unskillful medical treatment.

Thomas and *Nunes*, for the prosecution.

M. S. Latham, *S. Heydenfeldt*, and *M. E. Mills*, for prisoner.

Hager, J., charged the jury.—The prisoner at the bar, *Marion*

Whithurst, together with *William Roberts* and *Charles Bearss*, stand charged with the murder of *A. A. Mason*, as is contained in the indictment which has been read to you.

To this indictment the prisoner has pleaded not guilty, and demanded a separate trial.

The issue thus formed, whether or not the defendant, is guilty of the offense charged against him, or of any offense which is necessarily included in that with which he is charged in the indictment, you have been impanneled as a jury to try and determine by your verdict.

It is my duty to declare to you such matters of law as I may think pertinent to the issue, and necessary for your information; and although I may state the testimony, it is exclusively your province to consider it, and find the facts as disclosed. In other words, it is your duty to receive the law as declared by the court—but in regard to the facts and evidence, you must be governed by your own recollections and conclusions.

The indictment substantially charges the defendant, *Whithurst*, as principal, and *Roberts* and *Bearss* as accessories before the fact; that is, before the homicide was perpetrated.

Should you then find that a homicide has taken place as charged, and that *Roberts* and *Bearss*, or either of them, aided, abetted, or assisted, advised or encouraged in committing it, this fact might possibly render them all guilty of the homicide, but will not, of itself, excuse *Whithurst*, the defendant; that is, if you should come to the conclusion that *Roberts* and *Bearss*, or either of them, aided, abetted, or assisted, in committing the homicide, for instance, by throwing plates at deceased, the prisoner here on trial should not, for that reason, be acquitted.

You are at liberty, if the evidence will justify it, to find this defendant guilty or not guilty, whether *Roberts* and *Bearss*, or either, be guilty or not guilty.

If you come to the conclusion that deceased came to his death from the immediate effect of a wound inflicted with a pistol, by the defendant, then he must be guilty, either of—

Murder of the first degree;

Murder of the second degree;

Manslaughter; or,

Justifiable or excusable homicide.

[The court then proceeded to state at length how these are respectively defined by the statute law of this state, and to explain the distinction between murder and manslaughter.]

The court then charged:

In a criminal action the defendant is presumed to be innocent until the contrary be proved. And in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted; but if the killing be proved to have been committed by the defendant, then the burthen of proving circumstances of mitigation, or that justify or excuse the homicide, devolves on the defendant, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter; or that the defendant was justified or excused in committing the homicide.

By reasonable doubt is not meant a mere suspicion that the defendant may be innocent or guilty, or that any theory of the defense or prosecution may be correct, but a reasonable doubt of the defendant's guilt, after considering the whole testimony.

The question is, rather, is the understanding directed, the judgment convinced? Have you come to a conclusion in your own mind as to the guilt or innocence of the defendant? or is there, after a review of of the whole testimony, a reasonable doubt, and the judgment remains unsatisfied?

The defendant is entitled to the benefits of such reasonable doubts, if they exist.

Malice aforethought, according to its legal meaning, is not confined to murders committed in cold blood, with settled determination and premeditation, but extends to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are the ordinary indications of a wicked, depraved, and abandoned heart; as where the punishment inflicted by a party is without provocation, or even if upon some provocation, it is outrageous in its nature and continuance, and beyond all proportion to the offense, so that it is

rather to be attributed to malignity and brutality, than to human infirmity.

Express malice is the deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances, capable of proof.

Malice is implied when no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart.

The malice necessary to constitute the crime of murder is not confined to the intention to take away the life of a person, or to spite, malevolence, or revenge, which may be manifested by external acts and declarations, but also includes an intent to do an unlawful act, which may probably end in depriving a person of life.

It may be proper, in this connection, to declare to you some of the ordinary rules applicable to witnesses and testimony.

It is for you to decide what credit you will give to the testimony of witnesses. It is your province to arrive at the truth, and in order to do this you may credit or discredit testimony as your judgment of its value, and your estimation of the witnesses, may dictate.

The credit of witnesses may also be impeached. This is ordinarily done, or attempted to be done, by a cross examination of the witnesses; by disproving their statements by other witnesses; by general evidence affecting character for morality, truth, and veracity; and also by proof that the witness has made statements out of court contrary to what has been testified to at the trial, in regard to matters relevant to the issue. Whether or not in this action the credit of any witness has been successfully impeached or contradicted, or whether the whole or any portion of the testimony of any witness should be discredited, it is for you to determine.

If you find the testimony conflicting and irreconcilable, you may, if you feel so disposed, in arriving at a conclusion either for or against the prisoner, adopt or reject any portion of it, and ascertain the facts according to the reasonable probabilities of truth, or as the preponderance or weight of the testimony may indicate and convince your judgment. Neither are you confined to the positive or direct proof in arriving at a

conclusion; a jury may, in any case, *infer* or *presume* guilt or innocence from circumstantial evidence alone; and in arriving at a verdict you are at liberty to take into consideration any circumstances given in evidence either for or against the prisoner.

[The court here stated the testimony as introduced on the part of the people and the defendant, which is omitted, and then proceeded as follows.]

If you should come to the conclusion that the defendant, with a pistol inflicted the blow on the forward part of the left side of the head, which has been described by the physicians as the dangerous wound—then a still more important question remains for you to determine: was it mortal—or rather, did deceased die from the effects of that wound?

It is testified that soon after deceased received the wound, and dur- the same night, it was several times examined by the attending and consulting physicians and surgeons, and a slight indentation or depression of the skull, immediately under the external injury to the scalp, was detected; that subsequently, during the same night and next day, the symptoms indicated that compression of the brain had supervened, and deceased was laboring under its effects; that four physicians and surgeons were in attendance on the morning (May 13th) after the wound was given—Drs. *Waters*, *Nobles*, *Favor*, and *Lilly*—and they all agreed compression of the brain existed, and that the operation of *trepanning*, or *trephining*, as it is termed, was a necessary and proper remedy to be resorted to. This operation was performed by removing with an instrument called a *trephine*, a piece of the bone of the skull immediately beneath the seat of the injury, when it was discovered there was extravasated blood lying upon the outer membrane of the brain, which extended over a portion of, and below the orifice made by the instrument, and an indentation and fissure upon the piece removed, which was apparent to the eye. That after the operation deceased lingered until the 20th of May, following, when he died. A *post mortem* examination was then made of the entire skull, (which has also been produced on the trial,) and, as testified by the surgeons, it contained a fissure, or fracture, commencing at the place of the injury, running in two branches—one over the forehead, the other by the left side

of the head—down into the inner portions, and extending to the base of the skull, under which several ounces of *coagulum* was found.

Now, upon this branch of the case—as to the nature and effect of the wound itself, the skill of the operating surgeons, and the propriety of the medical and surgical treatment of the patient—there has been a great deal of testimony given by the attending physicians and surgeons, and others called as experts, and also reference has been made to the writings of many persons eminent, and of standard authority, in these professions, from which it appears there is much diversity of opinion.

Some of the witnesses have testified that the wound itself was necessarily mortal; others that it was dangerous, with small chance of life; and again others that it was not necessarily fatal, or even dangerous. Some of the witnesses and authorities recommend and support the operation of *trephining*, others condemn it. I am, therefore, unable to announce to you any general certain rule of practice, as established by the testimony, or the authorities cited by the witnesses and counsel, by which the character of this wound, or its skillful treatment, can be tested. If *trephining* had not been resorted to, a medical remedy would have been omitted which some of the witnesses testify was proper and advisable.

It is also a difficult matter for me to announce any general and applicable rule of law for your guide, but I will instruct you; that if you should find that the death was occasioned by grossly erroneous medical or surgical treatment, and not by the wound itself, the defendant is not answerable; but if it was occasioned merely for the want of the higher professional skill and treatment which is obtainable in the more populous cities and towns, but was not accessible in the remote section of the country where the deceased resided and was treated, the defendent is not, for that reason, to be excused and held innocent of any public offense.

If the operation was required for the proper treatment of the patient and wound, and it was performed with ordinary skill, and still death ensued as a direct or indirect consequence, the prisoner is not released from responsibility. If the surgeons knew that the operation would

give a chance of saving life, and had not performed it, it might have been contended in defense that deceased died, not from the wounds, but from the incompetency and neglect of his medical attendants. If, during any necessary remedial treatment, or operation, unforseen and usual causes cut short life, no exculpation should be admissible to attack the best directed efforts, properly made, for the preservation of life.

Should, however, an operation be unnecessarily performed, the responsibility of the prisoner would cease, if the death of the wounded party could be clearly ascribed to it. Thus, to illustrate my meaning, if bleeding is a necessary remedial treatment for an injury, and in performing it the surgeon wounds an artery, or in case of necessary amputation an artery be imperfectly secured, so that the patient in either case dies from hemorrhage, the prisoner would not be responsible, because it would be punishing him for an event depending on the unskillfulness of the medical practitioner. But if the bleeding or amputation be necessary, and be performed with all proper skill, and yet *tetanus*, gangrene, or fever, results, and destroys life, the prisoner might be differently situated.

It may in this connection be stated, that Doctors *Waters*, *Nobles*, and *Favor* considered the wound mortal.

Dr. *Favor*, who was sworn for the defense, says that in his opinion, death would certainly have resulted from the wound, operation or no operation.

Now if you find that the wound itself was mortal, and caused the death, it is hardly necessary to give any extended consideration to the medical treatment and remedies. If, however, you do not so find, then the question may become important for you to determine, whether the death is attributable to the wound itself, or to unnecessary and unskillful treatment of the physicians. And in this connection you should remember, if doctors, learned in medicine and surgery, disagree as to the particular treatment and remedy to be prescribed, a uniform rule cannot be adopted by the practitioner that all would support and pronounce proper. But he will probably be condemned by the one school opposed to, and supported by the other, favoring it.

You must recollect, however, the question presented to you is not whether medical skill could have saved the life of deceased, nor whether the attending physicians did or did not pursue the proper remedy; but what was the cause of death? and were available and proper means resorted to for the preservation of life?

If you should find that the wound and fracture on the left side of the head was the direct cause of the death, and that the prisoner gave and inflicted them, the next matter for you to determine is, the facts and circumstances of the killing; or rather, whether the prisoner has committed a public offense.

* * * * * * * * * * * *

In determining what, or if any offense has been committed, you will recollect and be governed by the principles of law which I have heretofore announced to you, applicable to these questions.

The evidence is before you, and it is for you to consider it and decide upon the important issues submitted for your consideration and reflection.

Your verdict, if general, should be either guilty or not guilty.

If the prisoner is neither guilty of murder in the first nor second degree, nor of manslaughter, your verdict should be not guilty.

If your verdict should be guilty, you must specify the degree of guilt, or rather the particular grade of crime.

If you should come to the conclusion that the prisoner unlawfully killed the deceased, and that the killing was willful, deliberate, and premeditated, you may, by your verdict, find him guilty of murder in the first degree.

If you should come to the conclusion that the prisoner, with malice either express or implied, unlawfully killed the deceased, but that the act was not willful, or was without deliberation or premeditation, you may find him guilty of murder in the second degree.

If you should come to the conclusion the killing was unlawful, but without malice express or implied, and without any mixture of deliberation, you may find the defendant guilty of manslaughter.

The court made some further concluding remarks, which involve no principles of law, and submitted the case to the jury.

The jury rendered a verdict, guilty of murder of the second degree.

PEOPLE *vs.* LYNN.

Ninth District Court for Trinity Co., April T., 1858.

OFFICIAL BOND—ERASURE—OFFICER—ELECTION.

The sureties upon an official bond, given by one on entering on his official duties, and conditioned that the particular individual, (naming him,) shall "well and truly perform, &c.," cannot, in an action brought against them as sureties, object that the election of their principal was unauthorised and void.

The fact of his having assumed the duties of office, although by virtue of an election that may have been illegal, is sufficient to charge the sureties, with a liability for acts done by him as such officer.

The fact that the name of one of the sureties to a joint and several official bond, has been erased, does not render the bond void, and those sureties who signed above the name erased, are bound by the bond.

Those who signed below are not bound, for it may have been that the signature erased was the principal inducement for them to sign, and the fact that the bond is joint and several, and that the action could be prosecuted against any or all of the sureties, does not prevent their pleading that it is not their bond, for there has been an alteration of consideration.

Action on an official bond which had been altered by erasing the name of one of the sureties therefrom.

The case was tried before a jury, who, being instructed to find a special verdict upon the following questions of fact, answered as follows:—

Was an election held in the county of Trinity on the 6th of Sept. 1854? Yes.

If so, who was elected treasurer of Trinity county? *C. F. Lynn.*

Did the person elected to the office of treasurer, execute the paper sued on, and described in plaintiff's complaint? Yes.

Did *C. F. Lynn*, ever take upon himself the duties of treasurer of Trinity county, and receive moneys belonging to the state, which he has failed to pay over into the state treasury, and if so how much? He did—$13,000.

What names were upon the bond of *C. F. Lynn*, at the time the name of *J. A. Batchelor* was erased? *All* the names now on the bond.

When was *Batchelor's* name erased, and by whom? Before the filing or approval of the bond, and by himself.

What amount is due from *C. F. Lynn* to the state of *California*, by virtue of the covenants in the bond sued on? $13,000.

On the trial several objections were interposed to the introduction of any testimony with regard to the election of *C. F. Lynn*, inasmuch as the supreme court in (6 *Cal.*, 76, and 84,) held that there was no general election for county officers in 1854, and as the general law required officers to be elected at the general elections for each county in 1853, 1855 and 1857, the election was without authority of law and therefore void.

J. Gallagher, (district attorney,) and *Sprague & McMurtry*, for plaintiffs.

Pitzer & Burch, *J. Chadbourne*, and *J. M. Howe*, for defendants.

DAINGERFIELD, J.—The election being under a special statute for Trinity county, and fair upon its face, and the bond reciting in terms that *C. F. Lynn* had been duly elected and qualified as treasurer of Trinity county, the sureties cannot go behind their bond, and attack the election in this proceeding. Whether he was duly elected or not, if *Lynn* has taken upon himself the duties of office as treasurer under and by virtue of said election, that fact alone will make the sureties responsible for his acts.

Even had *Lynn* not been legally elected, that is a matter that is personal to himself, inasmuch as, if not properly elected, he might be ousted, and the legislature have passed a law in reference to his office, and declared the election legal, so that he could not be ousted therefrom. The passage of this law did not affect the sureties, for they would be responsible whether *Lynn* was legally or illegally elected, and consequently no *ex post facto* law was passed, or law altering a contract. The sureties obligated themselves, that *Lynn* should perform the *duties of treasurer*, not that he should be legally elected treasurer. This objection is therefore not well taken, and is overruled.

Another point raised is, that the bond having been altered by erasing the name of *Batchelor*, without showing that it was done with the consent of all the sureties, the same is void absolutely. The authorities were fully examined on the argument of the demurrer, at the last term of this court, (*ante*, 34,) and after due reflection and examination, I then held that the instrument was not void, and the sureties whose names appeared above the erasure, (the name erased having been written after those above,) were liable, and I see no reason to change my former ruling. The bond is properly evidenced in this case, and all the sureties whose names are above *Batchelor's* are bound by this bond. The second objection is therefore overruled.

The third and last objection which I deem it necessary to notice in rendering a judgment of law on the facts as found, is, "that the sureties whose names appear below *Batchelor's*, are not bound." It is argued by the plaintiffs, that this bond is *joint* and *several*, and that under our statutes, any or all the sureties may be sued. This is literally true, but are not all official bonds so? Are not common law bonds generally written so? And still the authorities lay down the doctrine, that an erasure vitiates, sometimes to the whole extent, whilst under certain other circumstances, only in part. The remedy, or the form of action alone is changed by our statute, whilst the legal rights of parties are the same. Under our practice, the state may recover against a few only of the sureties, whilst those few may seek from the others their *pro rata* contribution. So that in truth it makes no difference practically whether the state sues or whether individuals sue.

Then if *Batchelor's* name was upon the bond at the time that *Rhodes*, *Seaman*, *Chadbourne*, and *Howe*, signed it, the presumption of law is that the name of *Batchelor* was an inducement moving them, and the bond having had its *consideration changed*, the plea which they set up as a defence, that it is not their bond, must be held good in the absence of proof, that the fact that *Batchelor* had signed it, could not have influenced them. For aught that has appeared on the trial, *Batchelor* was perhaps the only responsible person that signed the bond, out of whom the other sureties who signed after him could

have made any portion of this judgment, and apart from that fact, his having been an old resident and approved business man may have operated as an inducement.

I do not think from the facts found and the authorities cited, that the sureties below the name of *Batchelor* are bound, and I shall so order a judgment to be entered.

The counsel for the state contend that sureties cannot take advantage of a defence which the original could not. Whether that be law or not, is immaterial in the decision of this case, for I apprehend if applied to *Batchelor*, the plaintiff would be required to show a delivery before the erasure to bind him, and even were no erasure made, and the *conditions* were changed, the liability would not remain. But there is a difference between the principal and sureties, the sureties being only bound for acts under color of his being treasurer. *Lynn*, on the contrary, would be bound for any money he might receive for the state, representing himself as treasurer.

The judgment of law therefore upon the above facts is, that the plaintiff is entitled to a judgment against all the sureties named above *Batchelor*, and that execution issue against them jointly and severally, and that the defendants signing below the name of *Batchelor*, recover their costs of suit and money disbursements.

PEOPLE *vs.* LYNN.

Ninth District Court for Trinity Co., April T., 1858.

OFFICIAL BOND—LIABILITY OF SURETIES.

A county treasurer gave an official bond, and entered upon the discharge of his duties. Additional security being required, he gave a second bond, conditioned "to pay all moneys *hereafter* to be collected." Suit was brought against the sureties on this bond.

Held, that they were not liable for any moneys collected by their principal prior to the execution, &c., of the bond.

This was an action upon a bond given by *Lynn*, for the payment of

moneys which he might receive as treasurer, after he had entered upon the duties of his office. After giving the first bond, an additional bond was required, and given conditioned, "to pay all moneys *hereafter* to be collected, and faithfully to perform all other duties enjoined by law." The complaint averred that by reason of the conditions of the said bond, the defendant *Lynn* and his sureties, were bound to pay all money in his hands at the date of the execution of the bond.

(The same points were made about the election of *Lynn* that were mooted in *People* v. *Lynn*, (*supra* 187,) and decided in the same way. The special verdict was the same in relation to the election and acts of *Lynn*, as treasurer.)

J. Gallagher, (dist. att'y.) and *Sprague & McMurtry*, for plaintiff.

Pitzer & Burch, *Chadbourne*, *Howe* and *J. Baggs*, for defendants.

DAINGERFIELD, J.—There is no doubt in my mind, from the authorities cited, that sureties can limit their responsibility, and that this bond does limit the liability of the sureties to the payment of any moneys collected after the 3d day of December, 1856. In reply it is urged that the sureties have signed it as an *official bond*, and that official bonds are security for past as well as future conduct of an officer; and cases are cited showing that sureties for officers who had collected money before they executed a bond, were held bound for moneys thus collected. Public policy may require in cases of that kind such security, but where a bond has once been given, and additional security is required, as in this instance, no presumption is raised that the principal has funds in his hands for which the state has no security. The bond might have been refused, but having been received with the limitation upon the responsibility of the sureties, and approved by the proper officer, the limitation became a part and parcel of it, and the sureties are only bound for that for which they assumed to be responsible. It is an official bond *pro tanto*. Let judgment be rendered for all money received by defendant *Lynn* and not paid over, after the 3d December, 1856, the date of the bond sued on.

IN RE EDWARDS, ON HABEAS CORPUS.

Twelfth District Court for San Francisco Co., March T., 1858.

FUGITIVES FROM JUSTICE—REQUISITION—GOVERNOR'S WARRANT—AUTHENTICATION.

In order to justify the arrest in one state, of an individnal as a fugitive from justice from another state, upon the requisition of the governor of the latter state, the warrant of the governor of the state wherein such individnal is arrested, and by virtue whereof such arrest is made, must show that the proofs specified in the act of Congress, authorising and regulating this proceeding, were produced at the time of the requisition, and were authenticated in the manner prescribed in said act.

Such a warrant, which recites certain matters as though they were within the knowledge of the governor issuing the warrant, and then says: "which is evidenced by an authenticated affidavit of *A. B.*," *held* insufficient—it must appear that the affidavit was authenticated by the governor making the requisition.

Whether the said act of Congress authorises the arrest of fugitives from justice from a *territory*, under a requisition of the governor of such territory, *quaere?*

In the matter, on *habeas corpus*, of *John Edwards* and *Joseph Sparmer*, claimed as fugitives from justice from the territory of *Oregon*, and held under a warrant issued by the governor of this state, upon a requisition of the governor of said territory.

H. S. Brown, district attorney.

A. Campbell, for petitioners.

NORTON, J.—The return to the writ of *habeas corpus* in this case, sets forth that the prisoners are detained by virtue of a warrant of the governor of this state, issued upon the requisition of the governor of the *territory of Oregon*, for their surrender as fugitives from justice. The warrant is produced as a part of the return, but the requisition is not produced nor the proofs by which it was accompanied. The legality of the detention must therefore be decided wholly by what appears on the face of the warrant.

The act of Congress of 1793 provides that when the executive of one state shall demand a fugitive from justice, "and shall moreover

produce the copy of an indictment found or an affidavit made before a magistrate of any state or territory, as aforesaid, charging the person, so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person, so charged, fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested," etc. Judge *Story* says, 16 *Peters*, 620, that it was because the constitution was silent as to the party upon whom the demand is to be made, and as to the mode in which it shall be made, that this act was passed, " which designated the person upon whom the demand should be made, and the mode and proofs upon and in which it should be made." Many cases decided under this law, and, so far as I know, all the cases, have held that in order to justify an arrest under it, the warrant of the governor must show that the proofs specified in the act and authenticated as therein specified, were produced at the time the requisition was made. *Ex parte Thornton*, 9 *Texas*, 635 ; *ex parte Joseph Smith*, 3 *McLean*, 121 ; *State* v. *Schlemn*, 4 *Harrington*, 577 ; and see also *in the matter of Hayward*, 1 *Sand.*, 701.

The warrant in this case recites certain matters as though they were in the knowledge of the governor of this state, and then says : " which is evidenced by an authenticated affidavit of *T. B. Trevitt*," but does not state that the affidavit was taken before any magistrate of any territory or how or by whom it was authenticated. This warrant is insufficient, especially in omitting to show that the affidavit, which is indispensable to give the governor of this state authority to act, was certified as authentic by the governor making the requisition. It cannot be assumed that it was authenticated in the manner required by the act of Congress merely upon the recital that it was authenticated. If that were so, it would be sufficient in all cases to say briefly that a requisition has been made upon proper proofs. In this case it is not stated to be duly authenticated.

It was urged in the argument, that this arrest might be sustained under the statute of this state concerning crimes and punishments, §665, which requires a fugitive to be surrendered on demand, without speci-

fying the proofs, or mode upon or in which the demand shall be made. It might be sufficient to say that the warrant in this case does not purport to have been issued under the laws of this state alone, but "by virtue of the authority in me (the governor) vested by the constitution and laws of the United States, and the state of *California*." It does not appear that such a demand was made, as the governor would have considered sufficient under the laws of this state alone. He doubtless considered that the law of this state was only intended to make it obligatory on the governor, by the law of this state, to give effect to the law of Congress upon the subject. For this purpose, our legislature seems to have considered it unnecessary to do more than impose the duty in general terms, supposing the governor would act under, and, in the cases prescribed by, the act of Congress. But, if this section of our statute concerning crimes and punishments, is to be considered as an independent law of Congress, I should have little hesitation in saying that it would be inoperative for want of provisions as to the mode of its execution. It would, as judge *Story* says of the constitution before the passage of the act in 1793, confer and impose "a nominal right and passive duty." It cannot be that the legislature intended that a citizen should be seized and removed from the state, upon the demand of the executive of another state without the production of any proof that he had committed any offence, or was charged with any, except by the mere word of the executive making the demand.

It was also objected to the legality of this arrest that the act of Congress of 1793 is limited by its terms to requisitions made by the executive of a state, or of either of the territories, northwest or south of the *Ohio*, and also that the constitution of the United States is limited to requisitions made by the executive of states, and hence does not authorize the act of Congress so far as it imposes an obligation on the executive of a state to surrender a fugitive on the requisition of the executive of a territory. These are serious objections and not easily answered, but I have preferred to dispose of this application on other grounds and upon the authority of adjudged cases. Surrounded as this state is, and for a long time will continue to be, by territories, it will be a great evil if the criminals who will seek an asylum here from the

justice of those territories cannot be demanded and removed. Any difficulty on this ground might be readily removed by our legislature embodying the details of the act of Congress of 1793, or some equivalent provisions, in §655 of our act concerning crimes and punishments. Provisions of this nature, I believe, are usually contained in the laws of other states, where similar laws are passed.

The prisoners must be discharged.

TAFFTS, Assignee v. MANLOVE.

Sixth District Court for Sacramento Co., April T., 1858.

ATTACHMENTS — PROCEEDINGS IN INSOLVENCY.

The property of an insolvent debtor who has applied for the benefit of the insolvent law, is not the subject of seizure under process of attachment, subsequent to the filing of the petition in insolvency, and the entry of the order staying proceedings.

The moment the petition is filed, the property ceases to be the property of the insolvent, and becomes, *ipso facto*, the common property of the creditors.

Although the insolvent is permitted, unless for good cause shown, to remain in charge of the property until an assignee can be appointed, yet the statute contemplates his holding it as a receiver, or officer of the court.

The chief object of the act is, to enable an individual to distribute his property *pro rata* amongst his creditors, and to hold that, from the time of filing the petition, to the appointment of an assignee, the property described in the petition is liable to attachment, would be to defeat the avowed object of the statute.

This was an action instituted by plaintiff, as assignee in insolvency, against defendant, sheriff of the city and county of Sacramento, for the recovery of certain property seized by the latter under process of attachment, issued at the suit of certain creditors of the insolvent debtor. The latter had filed his petition, schedule, &c., in pursuance of the provisions of the insolvent law, and the usual order requiring the creditors to meet to appoint an assignee, &c., had been made, when certain of the creditors caused writs of attachments to be issued, directed to

the defendant, as sheriff, by virtne of which he seized such of insolvent's property as was to be found in his county, being the same described in said schedule. An assignee being duly appointed at the meeting of the creditors, he instituted this action against the sheriff to recover the property. The case was submitted to the court upon an agreed statement of facts.

Botts, J.—The facts in this case are agreed, and the questions presented is this: Can a particular creditor acquire a special lien by the levy of an attachment after the filing of an insolvent schedule, and an order staying proceedings?

The act is entitled "an act for the relief of insolvent debtors, *and protection of creditors.*" One of the chief and avowed objects of the act, is, to enable an individual to distribute his property *pro rata* amongst his creditors, and it is upon this basis, viz: that he has surrendered all he has, with perfect impartiality, that he obtains his discharge. Now, to hold, as the defendant would have us, that from the time of filing the petition, which is the confession of bankruptcy, to the appointing of an assignee, a period of thirty days at least, the property described in the schedule is liable to attachment, would be to defeat the avowed object of the statute. It would be to invite that competition, that special appropriation, which the statute aims to prevent. I think there can be no doubt that, from the moment the petition is filed, the property ceases to be the property of the insolvent, and becomes, *ipso facto*, the common property of the creditors. This effect is produced, not so much by the order staying proceedings as by the act of assignment. Hence, it is made the duty of the judge who certifies the petition to take charge of it and see that it is filed. See sec. 5 of *insolvent act.* It is true that, unless for good cause shown, the insolvent is permitted to remain in charge of the property until an assignee can be appointed, but it is evident from sec. 9, that the statute contemplates his holding it as a receiver, or officer of the court, who may be at any time displaced, when another may be appointed in his stead, If the property were perishable, I apprehend it could be sold only under an order of the court, and without such order, the purchaser

could acquire no title. This, it seems to me, is the only possible mode of giving effect to the obvious intent of the statute.

The plaintiff is entitled to have and recover of the defendant the the sum of $1,730 24, that being the admitted value of the goods belonging to the plaintiff unlawfully taken and converted by the defendant. Let judgment be entered accordingly.

NATOMA WATER AND MINING CO. v. CLARKIN.

Sixth District Court for Sacramento Co., April T., 1858.

INJUNCTION — MOTION TO DISSOLVE — BILL AND ANSWER — AFFDAVITS — WASTE — IRREPARABLE INJURY.

On a motion to dissolve an injunction, where defendant moves upon bill and answer alone, plaintiff will not be allowed to introduce affidavits to sustain his bill, or contradict the answer.

On such a motion, so made, the reading affidavits to contradict the answer was always addressed to the discretion of the court.

Although perhaps, affidavits might sometimes be read to support the simple allegation of waste, yet in no case can they be read to support the plaintiff's equity.

The defendant's verified answer is not an affidavit, within the meaning of the *code*, which will authorize the admission of counter affidavits.

Affidavits, being taken *ex parte*, and only disclosing so much of the truth as suits the purposes of the party producing them — courts should, whenever discretion is left them, exercise it towards the exclusion of the affidavits.

The issuance of a writ of injunction in restraint of waste, proceeds upon the assumption that the injury complained of, is in its character *irreparable*.

In England, this irreparable injury is regarded as extending to the injury or destruction of timber, because the inheritance is expected to descend to posterity unimpaired, and the timber is regarded as possessing a peculiar value from family association or other similar reasons, to the owner or inheritor, which cannot be pecuniarily estimated.

In this country, this doctrine does not extend to cases of the removal of earth, cobble stones, gravel, &c., or injury to wood or timber, unless they present some strong and peculiar circumstances.—*Contra, Hensley* v. *Tarpey*, 1 *Cal., Dist. C.*, 120.

This was a bill in equity filed by an association organized for mining purposes, to obtain a perpetual injunction restraining defendants from

digging and removing certain gravel, earth, cobble stones, &c.—from destroying or injuring timber, and to recover damages for the injury already done. A temporary injunction was allowed. On motion to dissolve the same. The necessary facts are stated in the opinion.

BOTTS, J.—The complaint alleges that the plaintiff is the owner, in fee simple, of certain premises, upon which the defendants have entered, and that they are still holding adversely to the plaintiff. It is also said that the defendants have been for several years cutting wood and growing timber, upon said land, and that they threaten to continue; and it is further alleged that the defendant, *Anderson*, has removed large quantities of cobble stone and earth, and threatens to remove other gravel, cobble stone and earth. The plaintiff prays judgment for the possession of the premises, and that the defendants may be enjoined from cutting, carrying away, or destroying wood, timber, cobble stones and gravel, from the premises.

The injunction issued in pursuance of the prayer of the bill, and now, upon the coming in of the answer, the defendants move for a dissolution. The answer denies the facts alleged in support of the allegation of title in the plaintiff. The plaintiff offers to sustain his title by affidavits, and the first question to be determined is, are these affidavits admissible? In investigating this much mooted subject, it may not be altogether irrelevant to consider the nature and character of the mode of evidence by which the plaintiff seeks to sustain his allegation of title. It is an importation from the civil practice, and is totally repugnant to the theory of the common law. Affidavits are taken *ex parte*, without the purifying process of cross-examination. Every practitioner who is familiar with the two methods, is aware that the one developes one-half, and the other the whole truth. The party who puts a witness upon the stand is prohibited from shaping his questions in a leading form, whilst he generally draws the affidavit himself, disclosing as much of the truth as suits his own purposes, couching the statements in his own phraseology, and getting his honest, but careless friend to swear to it. Nothing can be more unsatisfactory than this kind of proof, and whenever a discretion is left in me, I am inclined to reject it.

Unquestionably the old doctrine was this: the injunction is granted upon the *ex parte* showing of the plaintiff; if that showing be refuted by the answer of the defendant, then is the presumption in favor of the plaintiff overthrown, and the injunction must be dissolved. So far was this rule carried by lord *Eldon*, that although the grand jury had found a true bill against the defendant for perjury in verifying the answer, the chancellor still held, that the answer, having met the plaintiff's allegations, there was no longer any presumption to sustain the injunction. See *Clapham* v. *White*, 8 *Vesey*. Mr. *Waterman*, in his notes to *Eden*, reviews the cases, and is clearly opposed to the reading of affidavits, even where the allegations of the bill are admitted, and the defense rests upon new matter set up in the answer. See 1 *Waterman's Eden*, 138. The first case to which I am cited by the plaintiff is that of *Poor* v. *Carlton*, 3 *Sumner*. In this case judge *Story* labors for the position he assumes, but all he contends for, is, that in special injunctions, (in America there is no distinction between general and special injunctions,) affidavits may be read in support of the allegations of the bill, at *the discretion of the court*. The reading affidavits to contradict the answer, is certainly, to say the least of it, the exception to the general rule, and is always addressed to the discretion of the court. I should certainly be loth to make the trial of the complex and difficult question to so excellent a rule; and indeed, Mr. *Dickens*, who is cited by the plaintiff, says that, although affidavits may be read to support the simple allegation of waste, in no case can they be read to support the plaintiff's equity. This distinction is too obviously sensible to require the aid of argument.

I am next referred to the construction, in *New York*, of a statute similar to our own. The first question that was raised in *New York* was this: Did an answer, verified in the form originally prescribed by the code, viz: upon information and belief, merely, overthrow the positive allegations of a bill and entitle the defendant to a dissolution? The courts held that there was nothing in the *code* that altered the old chancery rule; and that, inasmuch as such an answer would have been insufficient under the old system, so it would be under the new. No injunction should be granted upon a complaint thus verified, and

no motion could be sustained upon such an answer. Such is the purport of the decision in *Roome* v. *Webb*, 3 *How. Pr.* The *code* was afterwards so amended as to require the old chancery jurat, as does the *California code.* Upon such a jurat, a new question arose. The *New York* statute, as does our own, provides that if the defendant moves to dissolve the injunction upon answer alone, no opposing affidavits shall be read; but if upon affidavit, then such affidavit may be rebutted by counter affidavit. Now, it was charged that when the defendant moved upon an answer, verified in the new form, he moved, virtually, upon an affidavit, and thus opened the way to counter affidavits; and this reasoning, very sophistical, as it seems to me, was upheld by judge *Harris*, for whose opinions, in general, I have great respect, in *Schoonmaker* v. *Reformed Pro. Dutch Church*, 5 *How. Pr.*, 265. But it does seem to me that our statute is conclusive; it requires the answer to be made out in a particular manner; on motion, upon such an answer, no affidavits upon the part of the plaintiff shall be read. To call such a verification an affidavit, is to confound all distinction between an answer and an affidavit; or rather, it is to construe every answer to be an affidavit; this is to ignore a distinction upon which the provision of the statute is based. Affidavits in rebuttal of the answer, says the statute, can only be read in those cases where the defendant relies upon affidavits in addition to his answer. Affidavits, says the construction, may be read on the part of the plaintiff, whenever the motion is based upon an answer verified in the manner prescribed in the statute — that is, upon answer alone. Such a construction is, it appears to me, based upon reasoning the most erroneous, and contradicts the clear meaning and intention of the statute. So it is held in *Servop* v. *Stannard*, 2 *Code.* Judge *Edwards* says: "The word *affidavit*, can hardly be construed to mean *answer.* We find the words answer and affidavit throughout the *code* applied to different objects, and, certainly, in their ordinary acceptation, they are not synonymous." In *Merced Mining Co.* v. *Fremont*, (7 *Cal.*, April T.,) the court say: "But it seems to be the general rule in England, that if the answer deny the exclusive right of the plaintiff, then the injunction will be dissolved. This is based upon the

practice of not permitting affidavits to be read to contradict the answer, *as to the question of title.*"

It is true that, in this case the question did not arise, and that after fully discussing it on both sides, the court disclaims any intention of expressing an opinion upon the subject. This, at least declares the question of affidavits unsettled even under our statute, and leaves me untrammeled to decide it according to my best judgment.

Upon these grounds alone, I should hold, the answer denying that which constituted the equity of the bill, the injunction must be dissolved.

But I was never fully satisfied with the order granting the injunction. That order was made upon the faith of the decision in *Merced Mining Co.* v. *Fremont*, and as that decision is in direct opposition to the opinion in *Gates* v. *Teague*, which last case is cited in the former only to be approved, I feel at liberty to discuss the relative merits of the two decisions.

The writ of injunction has been called the right arm of a court of equity. It is an efficient, but it is also an arbitrary and despotic power; it may be wielded for good or for evil; it disposes of human rights and human liberty, without the intervention of a jury, and is totally opposed to the spirit of the common law. Indeed, the whole judicial power of the chancellor was, and is, based upon the assumption that there are wrongs for which the common law courts afford no redress; no man shall be deprived of his right to a trial by jury where that form of procedure is calculated to determine the right and furnish the remedy. It is only where the common law is deficient that equity steps in to fill the gap. This was, and is, the modest pretension of a court of chancery; but, under this garb of unpretending simplicity, this tribunal has concealed the most daring ambition, and by one pretense and another has invaded the province of the common law courts. After a severe struggle, the power of a despotic prince being thrown into the scale, the chancellor of England secured to himself the power of arresting and controlling the judgments of the common law courts. The next step was to enjoin the commission of waste, on the ground that, although the remainder man, or reversioner, had a remedy at law, that remedy was expensive and tedious. At length, lord *Thur-*

low, forgetting that the basis of this claim was the expense and circuity of the peculiar remedy prescribed to a reversioner, held that it was equally applicable to the case of an ordinary trespasser, against whom the common law remedy was clear, specific and as speedy as any other known to the old English system. Lord *Thurlow* was a bold man, and was content to say that the two cases stood upon the same footing, and that it made no difference whether the injury was committed by a privy or a stranger. Subsequent chancellors declared that injuries in the nature of waste might be enjoined, because in their character they were irreparable, and such as could not be compensated for in damages. Such an injury is the destruction of an English oak, which has shaded an ancestry for centuries, and which has a peculiar value to the owner that cannot be estimated in dollars and cents. This is an irreparable injury. Hence the doctrine, destruction of timber, injury to the inheritance, (in England most estates are expected to descend unimpaired to posterity,) are the proper subjects of injunction. And it is upon the basis of feeling and affection that a soulless corporation, in this commercial and mercenary age, when every thing is the subject of barter and sale, alleges, that no amount of money can compensate her for the timber, cobble stones and gravel that the defendants are threatening to remove. It does seem to me that this is the *reductio ad absurdum* of a theory, in its origin and purity, slightly tinged with romance and poetry. Those authorities that justify an injunction in trespass, admit that it is not a mere ordinary injury to wood or timber that will warrant the writ; there must be some strong and peculiar circumstances about the case. See *Stevens* v. *Beekman*, 1 *Johns. Ch.*, 318; *Nevitt* v. *Gillespie*, 1 *Howard*; *Kerlin* v. *West*, 3 *Green. Ch.*; *Tolbridge* v. *Freeman*, 2 *Dallas*; *Amelung* v. *Seekump*, 9 *Gill & Johns.*; and in *Gates* v. *Teague*, the court says: "A court of chancery is always chary of granting injunctions in cases of mere trespass. * * * Depriving the complainants of a large amount of gold bearing earth is a loss, but not irremediable in the sense which will entitle them to the relief they seek."

It is true that without expressly overruling this case, although they refer to it, the same court held an opposite doctrine in *Merced Mining*

Co. v. *Fremont;* but I cannot help thinking that the third case will, upon consideration, be made to conform to the first, rather than to the second; at any rate, I am sure that the doctrine of irreparable injury will never be extended to cobble stone and gravel.

For these and other reasons, the injunction must be dissolved. Let it be so ordered.

KIRBY v. LINDSAY.

Third District Court for Santa Cruz Co., March T., 1858.

WATER COURSES—INJUNCTION—RIPARIAN RIGHTS.

The law concerning the rights of riparian proprietors, is applicable to artificial water courses as well as natural ones, from which the former are not distinguishable; a title may be gained by twenty years *user*, as well to the former as to the latter.

No riparian proprietor has the right to use the water to the prejudice of the proprietors above or below him, as he has no property in the water itself, but a simple usufruct as it passes along. He must use it in a reasonable manner, which would not exclude domestic and manufacturing purposes.

A riparian proprietor cannot give the owners of land not adjoining the water course, the right to divert any portion of the water to the prejudice of the proprietor below.

Where a riparian proprietor requires *all* the water naturally flowing in a water course, in order successfully to carry on a certain manufacture, his right to the same will not be defeated by the fact that he had previously given permission to certain owners of land to divert a portion of the water at a point above him, "provided he be not thereby injured," although subsequent to the time of giving the permission, he may have increased his manufacture so as to require the whole of the water.

Where it is manifest that a riparian proprietor will suffer great loss by reason of the diversion of water from a water course, an injunction will be granted to restrain such diversion.

This suit was instituted by the plaintiffs against the defendants, charging them with diverting a portion of a stream of water which issued from the spring of one *Russel*, and ran along and by the land and

tannery of the plaintiffs, to the town of Santa Cruz, whereby the supply of water at their said tannery was diminished, to their irreparable injury, and prayed for an injunction, &c.

The answer denies the material allegations in the bill, and alleges:

First. That defendants were permitted by *Russel* to divert the water; and,

Second. That the original bed of said water-course is not by and along said tannery—that the water flowed there by means of an ancient ditch.

The evidence establishes the following facts:

First. That the stream of water has its source upon the land of one *Russel*, and runs in a south-easterly direction through his land, thence westerly by the residence of one *Dodero*, thence to and along the land of the plaintiffs, where their tannery is erected, to the town of Santa Cruz.

Second. That the original bed of said stream at *Dodero's*, continues westerly, not by the way of Santa Cruz.

Third. That the water of said stream, from *Dodero's* to Santa Cruz, flows through an ancient ditch, where it has been accustomed to flow for at least fifty years.

Fourth. That the stream is small, varying from two to six inches of water, according to the seasons.

Fifth. That one *Majors* erected a mill in 1853, about one-half mile north-west of said stream, and in the fall of 1854, diverted a portion of the water of said stream, at a point upon the land of said *Russel*, by means of a ditch, and that afterwards a brickyard was established by the defendants, near the said ditch, and about two hundred and fifty yards from said stream, at which brickyard, the defendants used the water which flowed in the mill ditch, by the permission of said *Russel*.

Sixth. That *Majors* ceased to use said water, or keep up the dam across said stream, for the space of three months before said brickyard was established, the same having been kept up, and the water conducted to the brickyard by the agency of the defendants.

Seventh. That one *Fleck* had permission of plaintiffs to use the

water of said stream, provided it was used without injury to plaintiffs.

Eighth. The diversion of water by defendants from said stream, diminished the quantity which had been accustomed to flow in said ditch by said tannery, to the injury of the plaintiffs.

Ninth. The land of the plaintiffs on which the tannery was erected, is bounded by the ditch, and situated between *Dodero's* and Santa Cruz.

Tenth. The land of the defendants, on which the brickyard is situated, is not adjoining said stream.

Colt & Peckham, for plaintiffs.

Watson, for defendants.

HESTER, J.—The owners of water courses are denominated riparian proprietors. The land on opposite sides of a stream of water may be owned by different persons; when such is the case, each proprietor owns to the middle or thread of the stream. *Angel on water courses*, §10.

The right of private property in a water course, is a corporeal right when it is derived from the ownership of the soil over which it passes; it is an incident to the land; *ib.*, §5; and it is sometimes called a natural easement in contradistinction to an artificial easement, which is a right in derogation of riparian rights, as a right to interfere with the accustomed course of running water, by diverting it, or keeping it back upon the land above, or by transmitting it altered in quantity or quality to the land below; *ib.*, §141. Or it is a right to the use of a stream underived from ownership of the soil.

Riparian rights are applicable to artificial water courses as well as natural ones, and from which they are not distinguishable. A title may be gained by twenty years *user*, as well to the former as to the latter. *Ib.*, §206; 6 *Paige Ch.*, 435; 3 *Paige Ch.*, 605.

The plaintiffs' land joins the artificial water course made by the priests upon the first settlement of the country, to convey water to their mission. The length of time of its existence, elevates it to the character of a natural water course, insomuch that its water cannot now

be changed to the original bed, without affecting legal rights acquired by the owners of the land adjoining it, who may be regarded, to all intents and purposes, as riparian proprietors. The plaintiffs, therefore, are to be considered as such, their rights growing out of, and existing by, that relation.

Every proprietor of lands on the bank of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration. No proprietor has the right to use the water to the prejudice of the proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below. The owner must so use the water as to work no material injury to his neighbor below him, who has an equal right to the subsequent use of the same water, as he has no property in the water itself, but a simple usufruct as it passes along. All the law requires is, that its use should be in a reasonable manner, which would not exclude domestic, agricultural and manufacturing purposes; 3 *Kent Comm.*, 438. In 3 *Rawle*, 256, it was held that a person had a right to so much of the water of a stream running across his land, as was needful and proper for supplying his tan-yard and bark-mill. A right to its use may be acquired by prescription, affecting riparian rights. In such case, the natural right of the riparian proprietor becomes subservient to the acquired right of the manufacturer. *Ib.*, 442.

In *Arnold* v. *Foote*, 12 *Wend.*, 330, the facts were that the lands of the parties joined. A spring issued from the land of the defendant, and ran across his land, and upon the land of the plaintiff, where it was used by the latter to water his cattle and irrigate his lands. No more water ran from the defendant's spring than what was wanted for domestic use, for his cattle, and for irrigation. The defendant ploughed a furrow below the spring, and thereby diverted the water from its natural channel, and caused it to flow upon his own meadow. The

court said the water from his spring must continue to run into the plaintiff's premises; and it must continue to water the land, no matter who may be its owner. The defendant has a right to use so much as is necessary for his family and his cattle, but not for irrigation, if the plaintiff is thereby deprived of the reasonable use of the water in its natural channel.

In 4 *Mason*, 400, *Story*, J., says, "The natural stream existing by the bounty of providence, for the benefit of the land through which it flows, is an incident annexed to the land itself." In 1 *Wils.*, 174, the defendant's defense was, that the stream issued from his land, and that by prescription he had a right to two pits of water for his cattle, &c.; but the facts were that he had enlarged the pits. The court said he had no right to enlarge the pits, and his defense failed. See also 10 *Wend.*, 264. In the above mentioned case, in 6 *Paige*, the court say, "The law is well settled that the owner of the superior heritage has no right to detain or divert the water which passes through his land, to the injury of those who were accustomed to receive it upon their lands below."

These authorities fully establish the position that the plaintiffs, as riparian proprietors, have a right to a reasonable use of the water flowing in the ditch by their land, without diminution; that *Russel* had no right, as riparian proprietor of the stream above the plaintiffs, to divert the water, or authorize others to do it; and neither had the defendants or *Majors* such right, when such diversion of the water affected the riparian rights of the plaintiffs.

It is no excuse for the defendants that the plaintiffs have, since the commencement of their tannery, increased their capital, which necessarily required an increase of water, as the defendants are not in a position to avail themselves of this objection, they possessing no riparian rights—the rights of other riparian proprietors not being before the court for its consideration. The defendants possessing no riparian rights, are therefore without excuse.

The testimony shows that the plaintiffs permitted one *Fleck* to divert a portion of the water from said stream, provided the plaintiffs were not thereby injured. The testimony does not establish that the injury,

if any, which the plaintiffs sustained, by insufficiency of water, was the result of the abstraction of water by *Fleck*, whose use of the water was at fixed hours when it was not needed by the plaintiffs.

Having disposed of the various defenses of the defendants, one other inquiry will dispose of the case, which is, did the diversion of the water by the defendants, affect the rights of the plaintiffs to such an extent as to require, for relief, the extraordinary remedy by injunction.

The erection of the dam across the stream by the defendants, and diverting a portion of the water to their brick-yard and there using it, and the consequent injury to the plaintiffs by such diminution of water, are facts too fully established to be resisted. The amount of capital in fresh hides necessary to prosecute the business of this tannery, their liability to injury for want of fresh water, render the business expensive and precarious, and even ruinous, unless there is a sufficient supply of fresh water when needed. The testimony shows that the plaintiffs on various occasions, to save their hides and prosecute their business by a supply of fresh water, were constrained to abate the dam, and to cause the water to flow in its accustomed channel. This, however, seems not to have been effected without exciting bad feelings—the issue between the parties was, who should have the water. The plaintiffs being riparian proprietors, and the defendants not sustaining that relation, the question is of easy solution. The plaintiffs needed the water when they were not supplied with it, and that the defendants' diversion of it occasioned the want of supply, are facts which must be conceded.

An injury has been proven. An injury to the hides for the want of fresh water, when it may happen daily, is irreparable. No prudent man would devote his time and risk his capital upon such an uncertainty. The plaintiffs' business must cease or the injunction must be granted. The injunction heretofore ordered with some modification, is made perpetual.

GOMEZ'S HEIRS vs. STOKES.

Third District Court for Monterey Co., April T., 1858.

EVIDENCE—EJECTMENT—PROCEEDINGS BEFORE ALCALDES AS JUDGES OF COURTS OF FIRST INSTANCE.

The rule that excludes public documents, papers, and records, as evidence, unless found in the receptacle, or in the possession of the custodian assigned by law, must be relaxed when applied to proceedings had prior to the establishment of the government of the *United States* in this state, before alcaldes, in their character of judges of courts of first instance, on account of the loose and informal manner of their conducting such proceedings.

Courts must, under peculiar circumstances, so modify rules of evidence, by making exceptions, as to protect rights and administer justice—and not enforce rules intended for the prevention of fraud, so as to encourage and protect fraud.

Proceedings in insolvency were instituted by *A.*, in 1847–1848, before *B.*, an alcalde; *C.*, the clerk of *B.*, had possession of the papers in said proceedings; in 1849 he died, and they were found by his administrator, labelled, "papers of *A.'s* rancho." In said proceedings said rancho of *A.* had been sold, and *D.* became the purchaser. *C.'s* administrator delivered said papers to *D.* In ejectment brought by the heirs of *A.* against *D.*—

Held, that the papers might be admitted, in the absence of any proof that there were any other proceedings, or any fraud or imposition, or that there were no such proceedings.

In such proceedings *A.* did not name three creditors in his petition, but when presented there were four before the alcalde, with the amount of their claims; and in the subsequent proceedings six appeared.

Held, that the omission of *Gomez* to name three creditors in his petition, was a formal defect, which, under the circumstances, did not render the proceedings void on the ground that the court had not jurisdiction.

In such proceedings the trustees sold certain real estate, belonging to the insolvent, at private sale, with the consent of the alcalde, and of the creditors. In ejectment by the insolvent's heirs, against the grantee,—

Held, that the fact that the sale was not at auction, did not invalidate it.

The sale was not made by an order of the alcalde.

Held, that the Mexican law gave the creditors the absolute *jus disponendi* of the insolvent's property, subject to a supervisory control of the alcalde, and, therefore, he having actually assented, taken in view of the loose manner of conducting such judicial proceedings, a formal order was unnecessary.

After said sale, *A.*, the insolvent, gave up the possession of the rancho to the grantee of the trustees, and he and the creditors always assented to the validity of the proceedings.

Held, that *A.* would have been *estopped* from setting up title to the land, and his heirs are equally *estopped*.

Ejectment brought by the heirs of a deceased insolvent, against the grantee of certain real estate, sold by the trustees appointed in the proceedings in insolvency. The necessary facts are fully referred to in the opinion.

Sloan & Johnston, for plaintiffs.

Hawes & Ashly, for defendants.

HESTER, J.—This is a suit brought for a tract of land. Both parties claim title thereto, under *Gomez*, the ancestor of the plaintiffs, and admit the title to have been in the ancestor.

The proof of the plaintiffs establishes the death of the ancestor to have occurred in 1851; that they are his heirs at law. Therefore, unless the defendants have established that the ancestor, at his death, was divested of the property in dispute, the same, by the law of descent in this state, descended to the plaintiffs; and if so, they are entitled to recover in this action.

The defendants claim under a judicial sale, had in a proceeding of insolvency instituted by the ancestor of the plaintiffs, in his lifetime, under the Mexican law. To establish their claim they offered the record of the proceedings in insolvency, of said *Gomez*, had before alcalde *Colton*, in the years 1847 and 1848. To this proof the plaintiffs objected, because this record came from the defendant, *Stokes*, who was not its proper custodian; that the law required it to be kept by the clerk of the county in which said proceedings were had, and not having been so kept, it is not entitled to credit, and cited *statutes* 1850, 80, § 30; 1 *Starkie on Ev.*, 202, 252, 256, 189, 192.

To determine as to the admissibility of this evidence, it is necessary to determine the character of the court in which these proceedings were had, the time when, and their nature. The proof establishes the following facts: that they were had in the years 1847 and 1848, upon the application of *Gomez*, before one *Colton*, who was then the alcalde of Monterey, and possessed the power of discharging the duties of a court of first instance, and that *Garner* was his secretary, who departed this life in 1849; that *Little* was the administrator of *Garner*,

among whose papers he found, in the year 1850, a bundle of papers labelled "papers of *Gomez's* rancho;" that this bundle he handed to *Stokes*, the same not having been filed with the clerk of the county of Monterey since its organization; that no proceedings of the said *Gomez*, in relation to his insolvency, were to be found in the clerk's office after the most diligent search, except the deed under which *Stokes* claims the land in controversy, and a mortgage made by him. The defendants further proved the execution of the various papers relating to the said proceedings of *Gomez;* his statements, admitting the existence of such proceedings; the sale of the property to *Stokes* for $3000; *Stokes'* payment of the purchase money, and the expenses of the court of said *Colton* in said proceedings; the surrender of the land to *Stokes* after his purchase, by *Gomez;* the acquiescence of *Gomez* therein until his death, and the acquiescence of the creditors.

The reason of the law, that papers and records should come from the proper repository, is, to give them credit, and to prevent imposition and fraud.

It is well known that public documents, papers, and records, which, by the usages of civilized nations, have assigned them a proper receptacle and custodian, were not so kept in *California* before the revolution and the institution of our government here; that the rule referred to was not adhered to by the keepers of such records and papers as those now before the court. And now to decide that such records should have no credit, and be rejected, because not found in the proper place fixed by law for their keeping, would be upsetting many of the landed titles in this country. And when there has been no attempt made by plaintiffs to show that there were different and other proceedings than those the papers purport to represent, or to show fraud or imposition, or that no such proceedings were had, the enforcement of the rigid rule contended for would not guard against fraud, but would encourage and protect fraud. Courts must, under such circumstances, so modify the rule by making exceptions, as to protect rights and administer justice. The ruling, therefore, upon the trial of this cause, in receiving the record evidence, is adhered to, and the evidence retained. The question then presented is, whether, from the testimony in this cause, the plaintiffs have title to the land sued for.

It appears from the evidence that in February, 1847, an attachment issued against the lands of *Gomez*, in favor of one of his creditors, and final proceedings therein were postponed for eight months; that subsequently other attachments issued, some against his personal property, others against his lands, and that final proceedings and sale were to be had therein about the first of November, 1847; that on the 3d day of Nov., 1847, he, *Gomez*, petitioned the alcalde for a postponement of final action therein. In the absence of testimony it must be presumed that the petition was not granted; that on the 4th day of Nov., 1847, *Gomez* applied for the benefit of the insolvent law, and for that purpose made a surrender of his property to his creditors; that the alcalde entertained jurisdiction, and decreed notice for a meeting of those creditors in the port of Monterey, on the 26th day of Nov., 1847; and as to the other creditors, that notice be given for their meeting forty days thereafter. That on the 26th day of Nov., the creditors in Monterey met, and *Gomez* delivered his personal property to them under said proceeding, which they accepted; and they agreed that *Dias* should take charge of it, and account to the creditors for its market value, and that the proceeds should be divided amongst them, and that the house be rented for one year. The creditors at this meeting appointed *Walter* and *Garner* their trustees and representatives, there being no objections made by other creditors; that on the 14th day of Feb., 1848, *Gomez* obligated himself to deliver to said trustees the muniments of his title to his rancho, which he afterwards fulfilled; that on the 5th day of April, 1848, the rancho was advertised for sale; that on the 5th June, 1848, the creditors met and authorised the trustees to sell the rancho to *Stokes;* that on the 7th day of the same month, a deed was made by the trustees to *Stokes*, for the rancho, in the name of the creditors; that on the 8th day of June a mortgage was executed by *Stokes* to the trustees, pursuant to the contract of sale, to secure the payment of the purchase money; that afterwards the purchase money was paid by *Stokes*, and the debts of *Gomez* cancelled, and that the several steps taken by the creditors and their trustees in the said proceeding in insolvency, and said sale, were controlled and sanctioned by said alcalde.

It is objected that these proceedings were not valid, because the alcalde had no jurisdiction thereof, on the ground that three creditors were not named in *Gomez's* petition. Considering the looseness of judicial proceedings in *California* prior to our state government, much injustice will be done if objections to formal defects should obtain. When *Gomez* made his application there were at least four creditors before the alcalde, with their names and amount of claims specified; in the subsequent proceedings, at least six creditors appeared. *Gomez* gave the court jurisdiction of his person by his application; the appearance of the creditors gave the court jurisdiction of them; and as to the subject matter of *Gomez's* application, none can doubt the court's jurisdiction. Therefore this objection does not obtain.

It is also urged by the plaintiffs that the trustees could not sell the land at private sale. The facts proven authorize the inference that *Gomez*, the creditors, and the alcalde, were all present and consenting to the sale. They were the parties interested, and had a right to waive any particular mode prescribed for such sales, and adopt some other mode. This was done, the creditors, who were more interested than any other person, expressly authorising it. Therefore this objection does not obtain.

It is further objected that the creditors had no power to sell the rancho except by an order of court. It seems, by the Spanish authorities, that the creditors had the whole control over the property in such cases, whether movable or immovable, of the debtor, subject, however, to a superintending control of the court—the same that administrators had at common law, over the personalty of the deceased. If this view be correct, the creditors had power to sell the rancho. But giving the proceedings in said case of insolvency a fair and rational construction, considering the time when, and the court in which, they were had, and the looseness which prevailed in such courts, I think from the beginning to the end of them they partake of a judicial nature. The alcalde was clothed with powers in two capacities—one as notary public, the other as judge. And when proceedings were had before him which ought to be of a judicial character, and nothing appearing to the contrary, the court ought so to consider them. The petition made to him,

his decree for a meeting of, and notice to, the creditors, the sale, the the making of the deed and mortgage, were under his superintending control, and were his judicial proceedings so far as the papers and testimony show his action—fully establishing the fact of his consent to the sale—a formal decree entered by him could do no more.

But this objection comes with poor grace from the heirs of *Gomez*, the person who produced, by his action, this state of things. He set this judicial ball in motion by his application—he surrendered his property to his creditors, and after the sale he delivered possession to *Stokes*—he consented to all the proceedings—produced by this means the cancellation of his debts—and acquiesced in this state of things until his death. Now, when these proceedings have had the effect of cancelling his debts, which have been surrendered up by his creditors, should they be declared invalid? This would make stringent rules, applicable to other states of society and regular governments, the instruments of fraud, and destructive to the best interest of the people, when applied to loose governments and a crude state of judicial proceedings.

Furthermore, none of the creditors have objected. It is a rule of law that whatever, by reasonable diligence, a person might know, he is presumed to know. These proceedings were all of such a character that *Gomez* and the creditors, if they did not know *in minutiæ*, they might have known by proper diligence; the law, therefore, presumes their knowledge. If they had any objections they might have made them. Their silence proves their assent; and *Gomez*, by delivering possession of the rancho, and making no objections to the deed, is now *estopped* from objecting to the validity of said proceedings; and so are his heirs and the creditors. The objections, therefore to the validity of said proceedings are overruled. *Stokes*, therefore, by his purchase, acquired all the title that *Gomez* then had to said rancho, and that no right thereto descended to the plaintiffs, consequently they are not entitled to recover.

Judgment is therefore ordered for the defendants.

ORTMAN VS. DIXON.

Tenth District Court for Yuba Co., April T., 1858.

MINING DITCHES—PRIOR APPROPRIATOR.

A. constructed a saw mill upon the banks of a certain stream, which was propelled by the waters of the stream. *B.* constructed a ditch above *A.*, and diverted the waters of the stream to certain mining claims, and there used it for mining purposes, but recognized the right of *A.* as prior appropriator, and only diverted the waters when not required at the mill. *A.* subsequently constructed another ditch above *B.*, conveyed all the water to the same mining locality to which *B.* had conveyed it, and there sold it to the miners. *B.* brought an action against *A.* to recover the use and possession of the water.

Held, that *A.*, as prior appropriator, had a right to the use of the water as appropriated at the time that *B.* built his ditch; that is, had a right to so much of it, at any time, as was necessary for the turning of his saw mill; but that *B.* had a right to it at all times when not actually used by *A.* for that purpose.

Action brought to recover the use and possession of the waters of a certain stream which had been diverted by defendants. The necessary facts are fully reported in the opinion.

Reardon, Smith & Mitchell, for plaintiffs.

Mesick & Swasey, for defendants.

BARBOUR, J.—The plaintiffs in this case filed their complaint to recover the use and possession of the water of Mill creek, and its tributaries, for mining purposes; and to procure the judgment of this court ordering and decreeing them the right of such use, as prior locators and appropriators of the water flowing in the creek.

In the fall of 1851 the first ditch was constructed, designated on the map filed as ditch No. 1, for the purpose of conveying the waters flowing in Mill creek to *Atchison's* bar. *Ortman* first commenced the digging of the ditch, and constructed it only a few rods. It was afterwards extended by the miners in that locality to the claims on *Atchinson's* bar. It appears, when located, to have been used as common property; no charge was ever made for the water it conveyed, and the miners indiscriminately repaired the ditch, and took the water as

they required it to wash their dirt. It was not reputed or known to be the exclusive property of any particular owner, though, from the testimony, *Ortman* was the first to commence its excavation. Be this as it may (for the evidence is very conflicting), *Ortman* and all others have long since adandoned the use of this first ditch, and the case must be decided upon the subsequent acquired rights of the parties.

In January, 1852, the defendants took up the waters of the creek for mining purposes, and erected a saw mill, which they have owned ever since, and used the same from time to time. In 1853, *Louis Duhamel*, with two others, commenced the construction of a second ditch, marked "Ditch No. 2" on the map, at a point above defendants' millpond, and higher up the stream, by means of which they diverted the waters of the creek to the same mining claims as the first ditch did. *Duhamel & Co.* used the water which their ditch afforded at such times as the defendants were not engaged in running their mill, but desisted whenever the defendants had use for the water. The evidence very clearly shows that *Duhamel & Co.* recognized and acquiesced in the prior right of defendants to the water of this creek. Sometime in the year 1855, *Duhamel & Co.* sold this ditch to the plaintiffs, by which purchase they acquired all the rights and privileges possessed by *Duhamel & Co.*, and since that time have used the water for mining. The defendants, in the Fall of 1856, constructed a third ditch, still higher up the stream, and above the last mentioned ditch, No. 2, of the plaintiffs, through which they diverted all the water ordinarily flowing in the creek, and conveyed it to near the same mining claims as the other two ditches, which they disposed of to the miners. According to the settled decisions of our courts, there can be no doubt of the superior title of ditch No. 2 over ditch No. 3, to the use of the water for mining purposes, *were it not* that defendants claim and assert their right as first proprietors to use the water at a different place and for a different purpose than of sawing lumber. This presents a question of eminent importance to the ditch and mining interest of the state, and deserves consideration.

That the defendants have the first, and, consequently, paramount title, to use the waters for propelling the machinery of their mill there

can be no doubt. But can they go higher up and take the water from the stream, and convey it to a different place, for the purpose of selling it to miners? If so they can defeat the object for which they first intended it, and have ever subsequently applied it. I hold that it is not permissible for a party to abandon the use of water, which they have used as a motive power for turning a mill at a particular place, and then take the same water up and apply it at a different place for another purpose, when by so doing it will destroy a water privilege acquired by a second party, *before the abandonment of the first use.* The plaintiffs constructed their ditch No. 2, and used the water subject to the right of defendants. When the defendants were engaged in sawing, plaintiffs ceased to take water, and only appropriated it when the mill was idle. This seems to have been the understanding of both parties prior to the construction of the third ditch by defendants. But it is contended that a first locator may change the point of diversion without losing his present right. This, I grant, may often be done, but in so doing the rights of subsequent proprietors above him on the water course must not be impaired. In other words, he cannot divest himself of a right already acquired in order to assert title elsewhere to the prejudice of subsequent locators. Our supreme court has decided, and justly, that the owners of a ditch may extend it so as to convey water from where it was last used to other localities; and I have no hesitation in saying that the defendants in the case at the bar, might at any time previous to plaintiffs' constructing their ditch No. 2, have preserved the water used at their mill (which was off the stream) and taken it where they chose.

Applying these principles to the facts of the case, I arrive at the conclusion:

1. That the defendants, *Dixon & Co.*, are first entitled to the water flowing in Mill creek, for the use of their sawmill.

2. That the plaintiffs, *Ortman & Co.*, are entitled to the use of a sufficient quantity of the water of the stream as will fill and supply their ditch No. 2, at such times as defendants may not be using the same to propel their mill.

3. That the plaintiffs are entitled to the water to fill their ditch No. 2, in preference to the ditch of defendants, No. 3.

4. That when plaintiffs' ditch is filled according to its capacity to contain water, then if there remain any surplus of water flowing in the stream, the defendants are entitled to have such residuum.

5. That the costs of this suit be paid equally by both parties.

Let a decree be drawn in conformity to this opinion.

HASTINGS v. HALLECK.

Twelfth District Court for San Francisco Co., March T., 1858.

ATTORNEY AND CLIENT—NEGLIGENCE—LIABILITY—DAMAGES —BURDEN OF PROOF.

In an action brought against an attorney for damages resulting from an alleged want of reasonable diligence and skill, the presumption of law is that the attorney did discharge his duty to his client, and the burden of proof lies with the plaintiff to establish the fact of negligence affirmatively.

An attorney is liable to his client for any damage resulting to the latter, from a failure on the part of the former to exercise reasonable diligence and skill in the conduct of an action.

In an action brought against an attorney for professional negligence in conducting the defence of another action, the burden of proving damage as well as negligence, lies with the plaintiff. And, it being alleged that the last mentioned action was lost through the negligence of the attorney, it is incumbent upon the plaintiff to show affirmatively that a good and valid defence to the action existed, entirely irrespective of the manner in which the defence was conducted.

An action was brought against *A.* to recover a certain amount of money borrowed by his attorneys in fact, who were acting under a power of attorney. The principal defence interposed was that the power of attorney did not confer authority to borrow money. Judgment was rendered against *A.*, and an appeal taken. *A.'s* attorneys did not, in their statement on appeal, raise the question as to the authority of the attorney in fact to borrow money, but prosecuted the appeal on a subordinate question—that of interest. The appellate court awarded a new trial. *A.'s* attorneys then stipulated that the judgment of the court below should stand affirmed, deducting the sum decided by the appellate court to have been erroneously allowed as interest. In an action by *A.* against his said attorneys for professional negligence, it was—

Held, that by failing to raise in the appellate court the main question in the case, to wit, whether the power of attorney conferred authority to borrow money, then waiving by stipulation a new trial, on which the question might again have been raised, the attorneys were guilty of such negligence as would render them lia-

ble to *A.* for all damage which he may have sustained by reason of such negligence.

In an action brought against an attorney for alleged professional negligence through which judgment was recovered against plaintiff in a certain other action in which plaintiff was defendant, and to satisfy which said judgment certain real estate belonging to the then defendant was sold under execution, the damages which the then defendant may be entitled to recover against the attorney, is not the value of the property sold, at the time of the institution of the action against the attorney, but is the amount of said judgment.

This was an action brought against defendants, attorneys at law, to recover the sum of $60,000 damages, alleged to have been sustained by reason of their culpable professional negligence and carelessness. An action was commenced in February, 1855, by *Adams & Co.*, against plaintiff, to recover the sum of $25,098 $\frac{11}{100}$, with interest, which, action, defendants were retained, as attorneys, to defend. Judgment was recovered therein against plaintiff, in April, 1856, for $37,386, and plaintiff's interest in certain real estate was sold under execution issued on the same, in April, 1857, for the sum of $22,000. It is alleged, substantially, that the defendants, in conducting said action on behalf of plaintiff, were guilty of gross professional negligence, (certain acts being specified,) owing to which, said judgment was recovered against plaintiff. That plaintiff's interest in said property, which was sold to satisfy said judgment is now worth $60,000; wherefore, plaintiff prays judgment in that sum.

The facts proven upon the trial were substantially as follows:

Plaintiff, *Flint, Peabody & Co.*, *I. C. Woods* and *D. Haskell*, (the two latter partners of the banking house of *Adams & Co.*,) were joint owners of six fifty-vara lots, situated in that portion of the city of San Francisco, known as North Point. It being deemed advisable by the owners to improve the same, plaintiff, in the summer of 1852, began and superintended the construction of a wharf and warehouse, (the latter being the same known as the North Point Dock Warehouse,) to which he continued to give his attention until July, 1853. It was necessary, in order to make room for the construction of the warehouse, to excavate the hill abutting upon the bay at that point. This hill was composed of stone, suitable for being employed for building purposes, and clay. Plaintiff employed an engineer of the name of *Huerne*, to conduct the erection of the warehouse and wharf, although he himself

acted as general superintendent. About the end of July, plaintiff retired from the superintendence of the works, and went to the Atlantic States on a visit. At the time of his departure, the front part of the wharf, one hundred and seventy-five feet, was then in perfect order for the landing of goods, but it was not completed up to the warehouse. A tongue of land ran out alongside of the wharf, and in the condition in which it then was, the only way to have got goods from any vessel that might have been lying there, to the warehouse, would have been to have landed them on the wharf, passed them thence to the tongue of land, and then have conveyed them up to the warehouse. By laying down planks, however, a sufficient flooring would have been furnished to have conveyed merchandise upon, over the wharf itself. There was no road to the warehouse then. The warehouse was about half completed; the back wall was finished some feet above the floor of the second story; the side walls were completed to the floor of the second story, throughout their entire length, and for a distance of about one hundred and twenty feet down from the back wall towards the bay, they had been carried up about four feet more. The front wall was not built at all up to this time. The building had been constructed of the stone obtained by the excavation of the hill. If the stone had not been so used, it would have been necessary to have removed it. The filling in had been done with the same material. The first story was then ready to receive storage to about half its capacity, between fifteen and twenty-five hundred tons; it was covered to that extent by the flooring of the second story. In 1853 and 1854, it was customary to receive goods on storage, in buildings not completed, by covering them over with heavy canvas. The said warehouse then could have been completed, with the materials and pursuant to the plans according to which it had, up to that point, been constructed, at a cost of $19,507, or a little less. A short time prior to his departure, plaintiff constituted one *Briceland*, who had been living in Shasta, and who came to San Francisco at his request, jointly with *J. P. Haven*, of the latter place, his attorneys in fact, by a certain power of attorney executed to them, and hereafter more particularly described. *Briceland* came to San Francisco for the purpose of taking *Hastings'* place, as general superintendent of the works at North

Point. He came down a few days before *Hastings* left, was present at the warehouse and wharf, observed the manner in which the works were going on, how the accounts were kept, the disbursements made, and all matters and things generally, relating to the works. He was, upon *Hastings'* departure, to assume the same duties which the latter had assumed, and to do exactly as he had done. The workmen had been always paid at the end of the week, under the superintendence of *Huerne*, by checks drawn by *Hastings* upon *Adams & Co.*, and by the latter charged to the account of the North Point Dock Warehouse. All other disbursements were made in the same way, that is, by checks upon *Adams & Co.*. About the time when he resigned the superintendence to *Briceland*, and a day or two prior to his departure, *Hastings* had a general settlement with his co-owners, touching the expenditures and disbursements, on account of the warehouse and wharf; these had then amounted to $52,000. At that meeting *E. P. Flint*, of *Flint, Peabody & Co.*, *I. C. Woods* and *D. Haskell*, were all present. It was then understood and agreed that the improvements should proceed on his (*Hastings'*) plans, and that the receipts from storage and wharfage should pay for them. The receipts for the first six months of 1854, would have averaged $2,000 to $2,500 per month, and for the last six months, from $4,000 to $4,500, the wharf being then completed. The wharfage for such a ship as could then have lain at the wharf, would have been from $50 to $60 per *diem*; storage at that time was worth from one to two dollars per ton, per month.

The power of attorney executed by *Hastings* to *Haven* and *Briceland*, was in the words following:

"Know all men by these presents, that I, *John Hastings*, of San Francisco city and county, state of *California*, have made, constituted and appointed, and by these presents do make, constitute and appoint, *J. P. Haven* and *J. N. Briceland*, separately and jointly, my true and lawful attorneys, for me, and in my name, place and stead, to collect, receive, and receipt for, all sum or sums of money due, or that may hereafter become due, as my proportionate share of rents or other profits, in and of a certain property contained within the parallelogram

bounded by Sansome and Montgomery, Chestnut and Lombard Streets, in the city of San Francisco; to represent me and my said interest therein, and to cast my vote in relation thereto, in common with my own co-tenants and co-partners therein, in all matters relating to the administration or improvement of said property, and to do and perform any and every act or thing relating to and concerning my interest aforesaid, excepting the sale or hypothecation thereof, as I, if personally present, might, could, or would do, in the premises. Giving and granting unto my said attorneys, full power and authority to do and perform all and every act or thing whatsoever, requisite to be done in and about the premises, as fully, to all intents and purposes, as I might or could do, if personally present. With full power of substitution and revocation—hereby ratifying and confirming, all that my said attorney or any substitute shall lawfully do or cause to be done by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal, this first day of August, one thousand eight hundred and fifty three.

"Signed, sealed and delivered,
in presence of
"*E. V. Joice.*"

"*John Hastings,* { L. S. }

At the time *Hastings* left, he expected that the North Point warehouse would be a self-sustaining undertaking—that the income arising from storage would exceed all expenditures by $500 or $600. *J. P. Haven* combatted this idea, but *Hastings* was sanguine and very positive upon the point. He, however, stated to *Haven*, that if any advances should be required, they would be made by his co-owners. He also proposed to *Adams & Co.*, to make the advances at one and a half per cent. per month, but they—the current rate of interest being then three per cent.—refused to accede to the proposition.

After *Hastings'* departure, *Briceland* superintended the work in pursuance of the arrangement made between the owners, in the same manner that *Hastings* had prior to his departure. *Woods*, however, was the managing owner. *Briceland* exercised the same general supervision, and made the payments in the same way—by checks on *Adams*

& Co.—as *Hastings* himself had done. Shortly after *Hastings* left, however, alterations were made in the plans, both as to the warehouse itself and the wharf. The alterations were made by *I. C. Woods*, without consulting with the co-owners; he showed them to *Haven*, saying that the alterations had been made, and the latter expressed his opinion that they were wise ones. *Haven*, however, had but little to do with this branch of *Dr. Hastings'* affairs; although appointed a co-attorney with *Briceland* with regard to *Dr. Hastings'* interest in the North Point Warehouse, yet he also held another and more general power of attorney, and was *Hastings'* general financial agent. *Briceland* had more especial charge and oversight of the matters relative to the property at North Point. When the alterations were first suggested to him by *I. C. Woods*, he objected on the ground of the greatly increased expense which they would entail. When *Hastings* left, the understanding between all the owners was, that the building was to have been completed according to his plans, and as quickly and cheaply as possible. According to his plans, two, or at the utmost, two and a half months, would have sufficed for this purpose, entailing a further outlay of $20,000. *Briceland*, however, becoming satisfied that it would be more for the interest of the owners, and not much more expensive, assented to the alterations; *Haven*, upon this, gave his assent also; *Flint, Peabody & Co.*, were not consulted, but when informed of the changes, did not make any opposition, or object to the accounts presented for the improvements. *Adams & Co.* were their bankers, and they were upon friendly terms with them, which, as testified by *E. P. Flint*, of said firm, might have operated in inducing them to assent. The alterations in the plans were principally the substitution of pressed brick of Boston or Philadelphia make, for the front wall, and *California* brick at the sides, for so much of the walls as were then unfinished above the first story, in lieu of the stone obtained by the excavation,—of stones, clay and piles for the wharf, and foundation of the front wall, both of which where laid under water, instead of the pure stone obtained from the same source, and theretofore used while under *Hastings'* superintendence; and some minor changes and alterations superinduced by the adoption of the principal ones, just men-

tioned. Several builders testified that the alteration in the foundation, from pure stone, to stone, clay and piles, was not judicious under the circumstances of this case—the latter being only preferable where the bottom had a considerable inclination, while in this instance it was nearly horizontal, excepting only for a short distance near the extremity of the wharf; *Briceland*, however, considered that the change had saved the wharf. *Huerne* gave up any connection with the improvements soon after the alterations were adopted. The improvements were completed in January, 1854, and were then leased to *A. A. Cohen & Co.*, for $3,000 per month. *Flint, Peabody & Co.* were dissatisfied with the lease, but their relations being friendly with *Woods* and *Haskell*, they did not like to dissent; *Haven* thought that the terms of the lease were about as good as could be obtained; *Briceland* was of a strongly dissenting opinion at first, but afterwards concurred with *Haven* that it was about as good a thing as could be done. At that time there was no way of getting to the warehouse from the land side with a vehicle. *Cohen*, after he took the lease, opened a road at an expense of about $1,000. *Dr. Hastings* returned to this country in March, 1854, and left again in May, of the same year. At the time of *Hastings'* return, he instructed Mr. *J. Peachy*, who also held a power of attorney from him, conferring the superintendence of certain other real estate owned by him in San Francisco, to inform *Adams & Co.* that he (*Hastings*) repudiated the lease. *Peachy* did notify them by letter, as requested by *Hastings*.

The improvements at North Point had been finished in January, 1854, at a cost, in addition to the $50,000 expended by *Hastings* prior to his departure, of $100,336 $\frac{44}{100}$, of which his share was $25,089 $\frac{11}{100}$. A run upon the bank of *Adams & Co.*, took place in the first week of February, 1855, and *I. C. Woods* became urgent for *Hastings'* share of the money advanced by the bank on account of the North Point Dock property. He first desired *Haven* and *Briceland* to execute a mortgage upon *Hastings'* interest in the property; but that power being expressly withheld by the power of attorney, they executed to *Adams & Co.* an acknowledgment of indebtedness upon the part of *Hastings*, in the following words:

"$25,089 $\frac{11}{100}$. San Francisco, Feb. 13, 1855.

"On demand, for value received, we acknowledge an indebtedness to *Adams & Co.*, on the part of *John Hastings*, in the sum of twenty-five thousand and eighty-nine $\frac{11}{100}$ dollars; and an additional indebtedness of three per cent. per month interest on the amount of the above indebtedness, from the different dates of its advance, which advance has no reference to the date of the note. The debt from *John Hastings* to *Adams & Co.* has arisen in consequence of advances made by *Adams & Co.*, for the construction of wharf, buildings, and filling in, at North Point Dock property.

"*J. P. Haven,*
J. N. Briccland, } Attorneys for *John Hastings.*"

The reason of giving this note, or rather acknowledgment of indebtedness, was that *Woods* was urgent for his money. *Briceland* feared that if something were not done, he would secure his demand by attachment, and that *Hastings'* interests would thereby be sacrified—*Woods* stated as much to *Haven*—that he would attach unless some security were given him. Finding that they had not the power to mortgage, the attorneys executed to *Adams & Co.* the above instrument. On the 18th of Feb. *Adams & Co.* commenced suit, by attachment, in the superior court of the city of San Francisco, declaring upon the above evidence of indebtedness. *Hastings*, as before stated, arrived in March, and found the action pending. He left on the steamer of the 1st of May, remaining in the city about seven weeks. He then engaged the services of defendants to defend the action. *Hastings* left the state without personal service having been had upon upon him in the action instituted by *Adams & Co.*

Subsequently to this, *Mr. Peachy*, at the request of *Mr. Hackett*, (of *Hackett & Casserly*, attorneys for *Adams & Co.*,) signed a stipulation in the following words:

"The defendant, *John Hastings*, admits due and legal service of a

copy of the summons and complaint in this case, upon him personally, at the city of San Francisco, as of the first day of December, eighteen hundred and fifty-four, and stipulates that his appearance shall be entered in this cause upon filing this stipulation with the clerk of this court, on said first day of December.

" Dated August 31st, A. D., 1854.

" HALLECK, PEACHY, BILLINGS, & PARK,
" Attorneys for *John Hastings.*"

On the 14th of December a default was entered against *Hastings*, and judgment rendered in favor of *Adams & Co.*, according to the prayer of their complaint; and upon this judgment execution issued to the sheriff of the county of San Francisco, and by him a levy was made under the same upon the interest of *Dr. Hastings* in the North Point property. Upon hearing of the proceeding, *Mr. Peachy* obtained an order on defendants to show cause why the default should not be opened. In his affidavit, on motion to open the default, after setting forth that defendant had a valid defense, etc., he says that when *Hastings* was here, he (*Hastings*) had several interviews with *D. H. Haskell*, one of the plaintiffs, and refused to pay the amount for which the action was brought, " upon the ground that his attorneys, who gave the undertaking mentioned in the complaint, were not authorized to borrow money for defendant; and that the money, if any, which was advanced by *Adams & Co.*, on the said undertaking, if applied to the improvement of defendant's land, was so applied without his knowledge and consent, and contrary to his wishes and views with regard to the improvement of his property." * * * That—

" In the latter part of last August, *John K. Hackett, Esq.*, one of the plaintiffs' attorneys in this cause, requested affiant to appear for the defendant in this cause, and to acknowledge service of summons, saying that it would prevent the necessity of serving the summons by publication, which would be disagreeable to one of the plaintiffs, *D. Hale Haskell*, and to the defendant. That affiant refused to do so, and stated to *Mr. Hackett* that the defendant had no objection to service of summons by publication; that on *Mr. Hackett's* subsequently

urging affiant, on more than one occasion, to consent to appear for the defendant, he agreed to do so, with the full understanding and agreement, and with the assurance on the part of *Mr. Hackett*, that the defendant should not thereby appear to answer sooner than he would be obliged to do, if the summons were served by publication. With this understanding, affiant agreed to dispense with the service of summons by publication, and to be considered as appearing for the defendant at such time as by law the defendant would be held to appear, under the service of summons by publication, and not at an earlier day. That this agreement was made on the street; and *Mr. Hackett* told affiant he would send him a stipulation to that effect, to sign, and affiant promised to sign it. That a very short time thereafter, that is, within a day or two, *Mr. Hackett* sent to the office of the affiant the stipulation filed in this case, which the affiant signed without a particular examination of the points of time therein specified, and a comparison of the same with the times fixed by law for publication, and for appearance, and for answering—taking for granted that *Mr. Hackett* truly expressed, in said stipulation, the agreement made as aforesaid, at *Mr. Hackett's* instigation and special request."

And then the affidavit goes on to state, that *Mr. Peachy* had no knowledge of any of the proceedings, etc., until he heard of the issuance of the execution.

The default was ordered to be opened upon payment of costs, and leave to answer was granted.

Defendant put in a general denial for *Hastings*, and the cause came on regularly for trial. The trial was principally conducted by *O. L. Shafter Esq.*, for defendant, and *E. Casserly Esq.*, for plaintiff. *Mr. Peachy* was present in court during the whole of the trial. The first connection of *Mr. Shafter* with the case was about the time when the amended answer was put in. His attention was called, by *Mr. Peachy*, to the power of attorney to *Haven* and *Briceland*, with the request that he would examine and satisfy himself whether it conveyed the authority to the persons to whom it had been made, to borrow money in the name of their principal. *Mr. Shafter* examined and satisfied himself that the language of the instrument did

not necessarily carry that power, and was inclined to think that the power was not in the instrument. It then became a subject of consideration between himself and *Mr. Peachy*, as to the character of the facts and circumstances which existed at the time the instrument was executed, supposing that the other side might rely on these facts for the purpose of aiding in the construction of the paper. *Mr. Peachy* suggested that *Briceland* had the superintendence of the works, and probably could inform them as to all these facts. *Briceland* informed *Shafter* and *Peachy* that it was supposed at the time that the power of attorney was given, that all the owners were informed of the condition of the building. He said that at the time the note was given the work was in progress of erection; that it was contemplated to go on to a conclusion, and that *Dr. Hastings* had left no money behind to meet the outlay. After the termination of the interview, *Shafter* and *Peachy* came to the conclusion that the testimony would be adverse to them, and determined not to call *Briceland* as a witness, anticipating that the other side would do so to prove facts and circumstances for the purpose of aiding in the construction of the instrument. *Mr. Shafter* examined whether his testimony would be admissible for the purpose, and was very well satisfied that the evidence, if offered, would be received. The evidence was offered and objected to, but the objection was overruled, and the testimony received.

During the trial *Mr. Haven* and *Mr. Briceland* both testified that they each assented to the alterations in the plans. *Mr. Haven* further testified that when *Dr. Hastings* went away, he, *Hastings*, attended to the possibility of funds being wanted to complete the dock, and that he wanted the other parties to consent to advance whatever might be wanted at one and one half per cent. per month. There was evidence introduced that after the power was executed, supplementary authority was given. No question was made as to the shape of the note, but objection was made to the introduction in evidence of the note itself, under the power of attorney. The only ground upon which the defense was prepared, was as to the construction of the power of attorney, and as to whether, under it, money could be borrowed or not. *Mr. Shafter* was not aware, prior to the trial, of any alterations hav-

ing been made in the plans, and when aware of the fact it did not occur to him as a possible ground of defense. The case was argued to the court on the day after the close of the testimony. There were three points made for the defense:

1st. That the power of attorney, by the force of its language, did not carry any such power.

2d. That when read in the light of the facts and circumstances under which it was given, it did not carry any such power.

3d. That the testimony in the case which tended to show that a supplementary authority had been given, after the power of attorney had been executed, would not necessarily, by a fair construction, justify the finding of such a fact.

There was another point that was made:

That the face of the acknowledgment did not carry interest from its date back to the dates of the several advances—nor interest forward at three per cent. per month.

The action was determined adversely to *Hastings*, and notice of appeal from the whole judgment was given. *Mr. Shafter* prepared the case for the supreme court. The statement admitted the authority in the attorneys to borrow the money. The only point made in the supreme court was, that interest should not have been decreed on the amounts of the several advances from the dates when they were severally made, on the ground that there was no consideration for such interest. *Mr. Shafter*, on the trial, testified of the statement on appeal: "I intended to put enough into the statement on appeal to secure a reversal of the judgment, and I did." The judgment of the court below was reversed. *Adams* v. *Hastings*, 6 *Cal.*, 126. Upon the rendition of the judgment in the supreme court, reversing the judgment of the court below, a stipulation was entered into between *Mr. Peachy* and *Mr. Casserly*, reciting substantially that, for the purpose of saving the expense, etc., of a new trial, it was agreed that the judgment of the court below should stand affirmed, deducting therefrom $737, the sum decided by the supreme court to have been erroneously decreed as interest—leaving $37,385, being the amount of *Hastings'* share of the expense of the North Point works, less his share of the rents ac-

crued from the same property, and received by *Adams & Co.* They had been paid by *A. A. Cohen & Co.* to *Adams & Co.*, under written instructions from *Hastings'* attorneys. *Dr. Hastings* returned in 1855, before the statement on appeal was filed. He had frequent interviews with *Mr. Shafter*, and wanted to know about the course of the trial. *Mr. Shafter* told him all about the litigation, as far as it had proceeded. From that time until the cause was decided, *Hastings* called upon *Mr. Shafter* occasionally. He was greatly surprised at the course things had taken. In the language of *Mr. Shafter*, "his principal grievance appeared to be that we had not defended the case on the ground of departure from the original plan. I told him that so far as I was concerned, I did not know of any such departure, and that if I had I did not think that it would have made any odds. I told him that a new trial would be of no use to him, unless he could overcome the testimony of *Haven* and *Briceland*, and that under the same state of facts we should be sure to be beaten. I do not remember of his having indicated to me the name of a witness by whom their testimony could be overcome."

Mr. Casserly, and also judge *Shattuck*, before whom the case in the superior court was tried, both testified to the able manner in which the defense was conducted. The former stated that but little cross-examination was made by the defense, as it served but to fix the liability more firmly upon them; and that, now that a question upon the subject had arisen, it was his opinion that as much had been made of the case by the defense as could have been made.

F. J. Lippitt, *B. Peyton*, and *N. Bennett*, for plaintiff.

Defendants *in pro. per.*, and *G. Yale*, for defendants.

The first inquiry is, as to the character and extent of the obligations under which the defendants, as professional men, undertook to defend the suit of *Adams & Co.* v. *Hastings*. This was to exercise reasonable diligence and skill in their profession as attorneys at law, in defense of the said action. To that extent and no more they were bound. I do not lay down the proposition that an attorney is not responsible, provided he acts to the best of his ability; a man may act to the best

of his ability, and yet not comply with the contract. He must exercise "reasonable diligence and skill," and that necessarily excludes all acts of negligence, and it is to them that responsibility attaches. 2 *Porter*, (*Alabama*,) 210; *Pitt* v. *Yalden*, 4 *Burr*, 2060; *Pennington's Ex'rs* v. *Yell*, 6 *English*, 217; *Seydam* v. *Vance*, 2 *Indiana*, (*McLean*,) 102; and *Lynch* v. *Commonwealth*, 16 *Serg. & R.*, 370. The latter is a leading American case, and forcibly lays down the principle, that the liability of the attorney with us is just as great as in *England*, and is governed by precisely the same rules as in the latter country.

Secondly, as to the burden of proof, the presumption of law is, that the defendants did exercise reasonable diligence and skill, in their profession as attorneys and counselors at law, until the contrary is established by evidence in this case. *Pennington's Ex'rs* v. *Yell*, 6 *English*, 237. That is the presumption in favor of every professional man; it is not confined to the class of attorneys. I maintain that in this case, defendants discharged their duties to plaintiff to the fullest extent.

But besides this, if there was no substantial defense to the action of *Adams & Co.* v. *Hastings*—if no just and proper defense could have been set up in said action—then the defendants are not liable to the plaintiff in this action. I now refer to 2 *McLean*, 102, where the principle is laid down, that the party who charges negligence in the collection of a debt, must show that there was a subsisting debt, and that the party owing the debt was solvent at the time of the alleged negligence. Here, in this case, it must be shown, before default can be alleged on the part of the defendants that there was a good and substantial defense to the action of *Adams & Co.* v. *Hastings*, without regard to the conduct of the case. *Hagg* v. *Martin, Adm., Riley*, 157; *Grayson* v. *Wilkinson*, 5 *Sme. & M.*, 288.

Now, as to whether this power of attorney executed by *Hastings*, gave the power to borrow money, let us examine the facts:—and first, in what condition did *Dr. Hastings* leave the works at North Point—what were the means he left for their completion—what were his own expectations, and how were those expectations realized? I think it clear that *Dr. Hastings* had no very distinct or definite idea in regard

to what would take place after his departure. *Mr. Briceland* never understood that the improvements were to have been completed out of the profits. *Haven* says *Hastings* had some such idea—that he tried to overcome it—but that he (*Hastings*) gave him a paper to be submitted to *Adams & Co.*, by which they were to advance to the owners who might be behind-hand, including himself, funds to finish the work at a certain rate of interest. *Adams & Co.* refused to make advances at that rate, and as the advances had to be made, *Haven* agreed to give three per cent. *Hastings* left, knowing that *Adams & Co.* would advance him money. These facts show that *Hastings* did not expect that his property would pay for itself. He made provision for loans, the only question was about the interest. He informed his agents where they could get money, but now takes the position that he never expected that any expenditures were to be made for its completion, unless they were made out of the profits. His agents declare very distinctly that the building was not in a condition to produce a revenue. On this branch of the case it may be remarked—*Briceland* says he was to do just as *Hastings* had done; to use his own expression, he "stepped into his shoes." *Hastings* was drawing upon *Adams & Co.* when he superintended the works; *Briceland* did the same. In all the minute directions given by *Hastings* to *Briceland*, during the time that the latter was at the works at North Point, preparing himself to take *Hastings'* place, the latter on no occasion intimated to him that the improvements were to be completed out of the profits. No arrangements were made by which a profit was to be derived. No lease or other means of providing a revenue. In view of the facts of the case, there was ample authority, express and implied, entirely independent of the power of attorney, conferred upon the agents, to borrow money. *Hastings'* proposition to raise money was sufficient, or the constituting of a superintendent of the works was sufficient. But we have an express authority given by the instrument—to go on and complete the works. It gives them power to do everything, as will be seen by its terms, except to sell or hypothecate. In giving the note which they executed to *Woods*, the only way in which they affected *Hastings'* interests, was by the promise to pay three per cent. per

month. The liability existed before—the contract was express, and *Woods* could have commenced suit by attachment equally well without the note as with it. The supreme court decided that the obligation could not have a retroactive effect, but that the interest was to be prospective. This was the only effect that that note had, or by any possibility could have had, upon the interests of *Dr. Hastings.*

The suit was commenced in February, and *Hastings* returned in March. He called upon the defendants, and gave them some instructions in the matter. He left again in May, and returned in August. With regard to his first interviews with defendants, we have no testimony. All the allegations upon that point, in the complaint, are denied in the answer. In his second interviews, he wanted to know the character of the defense set up. The jury are necessarily, it seems to me, to try that case over again, and at the outset I repeat the proposition, that unless a good and sufficient defense to that action has been established on this trial, the plaintiff in this case cannot recover. On that trial the plaintiffs, *Adams & Co.*, called both *Haven* and *Briceland* as witnesses, and, as *Mr. Casserly* testified, the more the examination was gone into, the less there was for the defense. They testified then as they have testified now. The plaintiff says that if he had been present at the trial, he would have been able to have refreshed the memories of the witnesses, and have elicited from them the facts constituting his defense. But their testimony is precisely the same now as on the former trial. No more light has been thrown upon the subject now by the plaintiff himself, than was then produced by his attorneys, the defendants.

With regard to the alterations, *Mr. Briceland* says that he made many of them himself, and that *Woods* suggested others to which he at first objected, but subsequently assented. When he found the rainy season coming on, he assented to the substitution of brick for stone in the front wall and second story. Now the power of attorney gives the agents authority to represent *Hastings* and his interest, to cast his vote in relation to this warehouse in common with his co-tenants, and "to do and perform any and every act or thing relating to or concerning my interest aforesaid, excepting the sale or hypothecation thereof." What

does that mean? Was there any authority conferred on the agents by that written power? Has there been anything elicited on this trial in regard to the alterations, which goes to show that the money was not properly expended? *Briceland* assented to the alterations; *Haven* did the same, so did *Flint*. *Woods*, *Haskell* and *Flint* were a majority, and if *Briceland*, as the representative of *Hastings*, had persisted in his opposition, a withdrawal would have become necessary.

Something has been said about the admission of *parol* evidence on the trial in the superior court. The rule is very well settled that it is admissible. *Story on agency*, 79. It is only necessary that authority should be in writing, when something is to be done which requires writing under seal. When *Dr. Hastings* was leaving the state, he gave, for certain special purposes, written authority. Then in a subsequent conversation, he gave *Mr. Haven* particular authority in relation to the borrowing of money, and *Mr. Briceland* in relation to the work. When the question came before the court as to the power to borrow money, judge *Shattuck* came to the opinion, from the written instrument, construed in the light of the surrounding circumstances, that such power existed. The facts were that money had been received—that *Hastings* had been in the habit of drawing money from the house of *Adams & Co.*, and paying for the work done, by checks on the same firm—that *Briceland*, when he took charge, was to do the same thing—and that *Haven* received instructions to raise money in certain contingencies. Viewed in the light of these surrounding circumstances, the authority to borrow was sustained, as it should be.

Again, if the jury believe that the defendants omitted to do anything towards the defense of the case, which, if it had been done, would have been unavailing, then the defendants are not liable in this action; 5 *Sme. & M.*, 288; and further, if any important matter was omitted in the defense of the action, in consequence of the absence of *Dr. Hastings*, which might have been done, had he been present aiding and assisting, and that absence was not caused by the advice of the defendants, then they are not liable in this action. To support this I refer to *Spencer* v. *Kennard*, 12 *Texas*, 187.

The decision of the supreme court in *Adams* v. *Hastings*, (6 *Cal.*,

126) did not award a new trial. The principles upon the facts of the case had been settled by judge *Shattuck*, and *Mr. Shafter* was so perfectly satisfied of the justness of the claim against the defendant, that though an appeal was taken from the whole judgment, the case proceeded upon the question of interest alone. There was no question made on the appeal as to the facts. If the case had been tried over again, the result would have been exactly the same. The complaint here is, that if a new trial had been obtained, *Hastings* being present, the whole result would have been changed; but he has not elicited a single new fact. In *Dr. Hastings'* interviews with *Mr. Shafter*, he never named any witnesses who could establish a different state of things. The whole matter was talked over frequently. If no new testimony could be gotten, a new trial would not change the result. But the *remittitur* did not award a new trial—it went only to the matter of interest. Even if it had, the defendants, in the exercise of that discretion with which all attorneys are invested in the conduct of an action, in view of the whole case, being certain that there was a liability, were right in adopting the course which they did.

Balie Peyton for plaintiff.

The testimony in this case establishes, that at the meeting of the owners of the North Point Dock property, immediately preceding the departure of plaintiff for the Eastern States, it was agreed between them that the improvements then in progress of erection upon that property, should proceed upon the plans which plaintiff had adopted, and according to which they had, up to that time, been constructed. It is further established, that they agreed that the work should be finished out of the revenue which could then be derived from it, and *Mr. Flint* and *Mr. Huerne* both concur in the statement that it was possible to obtain revenue out of it. It was in a condition to receive storage. That there was a demand for such, has also been proven. The settlement by plaintiff with his co-tenants left several thousand dollars at his credit, at the banking house of *Adams & Co.* The building could at that time have received twenty-five hundred tons, at

from two to two dollars and a half per ton, while the wharf could have been made to yield from fifty to sixty dollars per day. These are the "surrounding circumstances," in the light of which this case is to be viewed. Besides which, *Huerne* could have completed the building for $20,000, and in two months and a half at the longest, which would have brought it only to the latter part of October, and before, probably, a drop of rain would have fallen. It was under these circumstances that the power of attorney was given, and in view of which the question is to be determined—whether it authorised the agents to contract that indebtedness to *Adams & Co.* We do not complain of the manner in which *Mr. Shafter* conducted the action in the superior court, but we do complain of his having been informed of nothing constituting a defense to that action, except what could be derived from a construction of the power of attorney. As to the construction of this instrument. It gives authority to "receive and receipt for rents." Can it be said that *Dr. Hastings* did not expect that there would be rents to "receive and recept for"? So far as money is concerned, this was the only authority the agents had. Take this in connection with the fact that *Dr. Hastings* expected to receive from this warehouse a net revenue of $500 to $600 per month, and also $1000 from *Mr. John Peachy*, from the rent of the houses of which he had charge, and can it be said that the power of attorney confers authority to borrow money?

Authority to borrow money must be given in express and direct terms. *Story on Agency*, 869. If the laborers on that house had come to *Mr. Briceland*, demanding their pay, and had told him that they would attach the property, and he had given them a note, the law would not, under this authority, have conferred upon him that power. It requires that the authority to do so must be express and direct. Was there any authority conferred here? See also 5 *Mees. & Wels.*, 595. It is held that the rule excludes bankers, but it is not so in this case, for *Haskell* and *Woods* did not stand simply in that relation. They knew every circumstance connected with the case. For this reason, the rule is inapplicable to them. When *Woods* altered the plans, he knew that they were not to have been

altered; that the warehouse, according to his arrangement with *Hastings*, was to be built as soon and as cheaply as possible. Instead of finishing the works in two months and a half, for $20,000, he spent $103,000, and took half a year. *Mr. Woods* had no right to ask to be reimbursed. He advanced the money with his eyes open—in his own wrong—in violation of a solemn agreement.

It is said that it was not necessary for the agents to have given the note which they executed, because *Hastings* was just as much bound before as after. But if an agreement had not been entered into, fixing the interest, it would have been only ten per cent. per annum. The supreme court decided that he was bound to pay three per cent. from the date of the note, making a difference of nearly $10,000 to *Dr. Hastings*, in that one item alone. And this interest was binding, as it was given in consideration of the "forbearance of the plaintiffs to sue." They forbore five days.

With regard to the character of these alterations, there can be very little doubt. *Briceland*, as the agent of *Dr. Hastings*, did at first object to the alterations, and it was only when the rainy season was coming on—before which the building would have been completed, according to *Hastings'* plans—that he assented. *Huerne* says that the alterations which delayed the completion of the work were positively injurious. The stone had been taken out of Telegraph Hill, and the excavation of that stone was necessary to give room to carry on the work. There was a double object attained: taking out the stone to obtain space, and to obtain material to carry on the superstructure. Instead of this, pressed brick was substituted, brought from the Atlantic States, at an enormous expense. To this *Briceland* protested; *Flint* was never consulted. Then where was the authority to make these changes? Again, they had not the authority under this power of attorney, to change the plans. It was not contemplated to invest them under it with any such authority. A tenant in common cannot, without the consent of the other co-tenants, make repairs upon the common property. 4 *Johns. Ch.*, 334; 2 *Richardson*, 317. In the case of tenants in common of a party wall, the law provides that it shall be preserved in *statu quo*, and then, when re-

pairs are necessary, the tenants in common, upon notice, shall contribute; but then, the party wall must not be higher nor broader. In this case, all the parties agree to put up the warehouse according to particular plans, and out of the materials upon the lot. It is now said that the majority controls; but in matters of this kind, the majority cannot control. If a tenant in common refuses to improve property, it must be divided. If not such property as can be divided, (as in the case of a ship,) then it shall be sold, and the proceeds distributed. In this case, the plans had been agreed upon, and the agents had no authority to alter them. They could only be altered by the concurrence of all the owners. But here one owner alone changes the entire plan, and substitutes pressed brick for cheap stone; and not only that, but delays the building for several months, thereby depriving *Hastings* of his bargain, that the warehouse should be finished by the middle of October. And all this contrary to an express agreement made between the owners themselves. The alterations were clearly made without authority, and *Hastings* cannot be held bound by them.

With regard to the question of negligence. *Dr. Hastings*, having come back and found this large suit pending, and retaining defendants to defend it, and rooming with *Mr. Peachy* while he remained here, it would be the most natural thing for him to do, (and it is most probable that he did,) to give *Mr. Peachy* a history of the case, and it is impossible that in doing so, he could have overlooked the important fact that, when he went away, it had been agreed that the work was to have been completed for $19,000, and that he had a right to believe from the then condition of the building and wharf, that the receipts would go far towards, if they would not entirely meet, his share of the expenditures. *Hastings* says that he stated all these facts. They are set out in detail in the complaint. The answer denies them collectively. I think that by the rules of pleading, this allegation of the complaint is to be taken as true, for all the purposes of the answer. But it will hardly be necessary to resort to legal inferences, arising from the state of the pleadings, to insist that *Hastings*, before his departure, must have communicated fully to his counsel all the

facts of the case. I repeat that we do not complain that *Mr. Shafter* did not conduct that action as well as it was possible to have been conducted from the information given him, but we do complain of the defendants for not having communicated to *Mr. Shafter* what they knew. Is it possible that *Dr. Hastings* could have omitted to mention the fact that the money was borrowed without his authority, and that it was expended contrary to his wishes? *Mr. Shafter* says that, in his numerous interviews with *Hastings*, "his principal grievance appeared to be, that we had not defended the case on the ground of the departure from the original plan." How could he have expected such a defense, unless he had communicated the facts? Defendants did not even suggest to *Mr. Shafter* the existence of the most important fact for the defense: that it had been agreed between all the owners that the plans of *Dr. Hastings* were to be observed in the completion of the building, and that no alterations were to have been made. If these facts had been adduced, *Judge Shattuck* would not have decided as he did.

There is also evidence of negligence in allowing the judgment by default to be taken against *Dr. Hastings*. *Mr. Peachy*, when he consented to waive service of summons by publication, did not even read the stipulation, and knew nothing about it, until one morning he found a judgment against *Dr. Hastings* and his property levied upon under execution issued on that judgment. But *Mr. Peachy* had no right to waive the publication of summons. Had he not done so, *Dr. Hastings* must have seen the notice, and he could have been here to attend to the action himself. He could have proven the facts which he has proven now, and which his counsel should have proven then. *Dr. Hastings* must have seen the notice, had it been published. With all his property and his home in *California*, he would have read every *California* newspaper that he could find anywhere, and they go everywhere. Had he known when his case was coming on, he could have returned, and changed its result. *Mr. Peachy* had no right to waive the publication of summons. But he did not read the stipulation which *Mr. Hackett* sent him. Was this the attention to his interests which *Dr. Hastings*, in Europe, had a right to expect from his coun-

sel? This is one item of the negligence which he charges. In permitting the default to be taken, and in neglecting to inform *Mr. Shafter* that the partners had agreed upon certain plans, and that it was to be a self-sustaining work, we conceive to have been acts of negligence.

We now come to another, greater and more important error, on the part of the counsel of *Dr. Hastings*, in the suit brought against him by *Adams & Co.*, and that is, that after the testimony of *Haven* and *Briceland* was heard, they omitted to call the only men who could have thrown any light upon the matter—they omitted to call *Flint* and *Huerne*, to prove the changes that had been made, and the consequences of these changes. *Mr. Huerne* was in the court-house at the time of the trial, but was not examined; and neither he nor *Mr. Flint* were ever spoken to on the subject.

Another important branch of the negligence of which we complain, is this: that when the judgment was obtained in *Judge Shattuck's* court, the principal point in the case was as to the construction of the instrument, and one would suppose that that point would be raised in the supreme court. But they waived that, too, and with it *Hastings'* case. Why did they not allow the supreme court to pass upon the only question of law in the case? How could they, in the exercise of the most ordinary diligence, have admitted that which there was no evidence to prove, that "this money was advanced at the special instance and request of the defendant," and also, that *Haven* and *Briceland* had full authority to borrow money? There was nothing left in the case. The question of interest alone, and only one-half of that—that is, when it was to commence—was brought before the court, and they decided it.

But there was another chance for *Hastings*, and that was the new trial awarded by the supreme court. That was all that he had wanted. But then his counsel signed another stipulation, and waived that, also. This was an act which they had no right to do. If they thought that a new trial would have the same result, they might have abandoned the case, and left *Hastings* at liberty to employ some one else. They had not the right, in opposition to his wishes, to throw away a new

trial altogether. When an attorney commences suit, he is bound to take every continuous step, from the beginning to the end, without any new request from the party, and is not justified in abandoning a case until it is concluded. And further, an appeal is as much a part of his duty as to commence suit, and I think all the authorities go to sustain that position. 3 *Johns.*, 184; 6 *Eng. C. L.*, 401; 15 *Mass.*, 315; 15 *Pick.*, 440; 5 *Moore & Paine*, 284; 2 *Chitty*, 311; 2 *Chitty Pl.*, 271. We think these various points show sufficient negligence on the part of the defendants to render them liable to *Dr. Hastings*, and more particularly than any other we rely upon the last that has been noted: that defendants were guilty of extreme negligence when they entered into the stipulation by which they waived the new trial which the supreme court had awarded, thereby depriving plaintiff of his last opportunity to make such a defence to that action as he has here shown that it was in his power to have made.

NORTON, J., charged the jury. This case, the trial of which has occupied your attention for the last few days, is of a peculiar character, and one which is not very frequently presented. The principal difficulty involved in the case is, that the jury are required to pass upon the conduct of professional men, in regard to the degree of skill and diligence which they have exhibited in the course of the performance of their professional duties—a difficulty encountered in the decision of all cases of this nature, but which becomes materially enhanced when the conduct or acts of attorneys becomes the subject of consideration. In these cases, perhaps, ordinarily the court can best judge as to the real merits of the controversy. Generally, in cases involving the question of the liability of persons following a distinct trade or occupation, such as that of a mechanic, for example, for damages resulting from their alleged unskillfulness or carelessness, neither court nor jury decide upon that question from their own individual judgment or their knowledge of that trade. In such cases witnesses are introduced and examined touching the precise point involved, and the question is then determined according to their testimony. In these cases there is generally but little difficulty. In the case before you, however, no

such testimony has been adduced, for the reason, probably, that the expectation has been that the court would so instruct you as to enable you to arrive at a correct conclusion from a consideration of the facts bearing upon this question, which have been proven upon the trial. In some of the cases to which I have been referred, the court has instructed the jury directly and positively upon this matter of negligence as a question of law, while in others the jury have passed upon it, under general instructions from the court, according to their own judgments.

That which, in my opinion, constitutes the most important, and which must be the controlling, fact in this case, was only brought to my attention towards the conclusion of the argument of counsel yesterday, and upon reflection I can see but very little for the jury to pass upon. In my opinion the liability of the defendants must be determined by the decision of questions which are in themselves essentially questions of law, and therefore addressed to the court, and not to the jury, for decision.

A determination of the question as to the liability of these defendants, renders it necessary, to some extent, to reconsider the action of *Adams* v. *Hastings*. That was instituted, as the evidence has shown you, for the recovery of a certain indebtedness of *Hastings* to those plaintiffs, which was created on his behalf in his absence by his agents and attorneys in fact, *Haven* and *Briceland*, and the principal question there raised and discussed was, whether or not they, the attorneys, had the authority to contract that indebtedness.

Their power, whatever its extent, was derived through and by virtue of the power of attorney executed by *Dr. Hastings* upon his departure for the eastern states. Being then solely conferred by this instrument, its extent and limitations must be determined by the construction which shall be put upon the power of attorney; and this, like all other questions of a similar character, that is, all those arising in the determination of the scope and effect of written instruments, is a matter of law, to be passed upon by the court. It is true that questions of this character are often submitted to juries for them to pass upon, but always accompanied by direct instructions from the court, charging them that if they shall find that the evidence discloses the existence of a certain

state of facts, then from these facts the law implies a certain consequence, which is also declared to them, and which they are instructed to express by their verdict; so that, as matter of practical effect, submitting the construction of a legal instrument to a jury, is rather a matter of form than an actual submission of the question to them—their real province being to determine the exact facts and circumstances the existence of which the testimony has disclosed.

Such a case would be presented here if the former action of *Adams* v. *Hastings* were at present before you; but the principal difficulty encountered now, arises mediately from the fact that you are not exactly trying the issue between *Adams & Co.* and *Dr. Hastings.* The question is as to the manner in which *Halleck, Peachy & Billings* defended that action—it is their conduct which you are to consider—their professional conduct in a matter entrusted to their charge in their character as attorneys. And with regard to this matter I shall charge you as requested, that the presumption is that defendants did discharge their duty to *Dr. Hastings* as professional men—that the burden of proof lies with him, and in order to recover, it is incumbent upon him to establish affirmatively the fact of negligence and want of due diligence on the part of defendants. *Hastings* may not have any right to a recovery against them, merely because they did not successfully defend the action in the superior court, and that may hold true, although they *might*, perhaps, have brought it to a different determination. The main proposition is, that they are liable for damages arising from a want of a reasonable degree of diligence and skill. It is not required of an attorney that he should exhibit the utmost professional skill in the conduct of a cause; in order to charge him with a liability for a loss resulting to his client, it is not sufficient that the jury should simply believe that the action *might* have been more successfully prosecuted (though, this fact must be established before a liability can be attached)—but he will be liable for whatever damage the client may have sustained by reason of his failure to exercise ordinary and reasonable skill and care.

This proposition is true of all the professions and trades. In the merely mechanical trades—in those in which manual dexterity is the

predominant feature—the question of ordinary and reasonable skill, presents, as I said, but little difficulty; but where the occupation is one requiring the exercise of the mental, rather than the physical powers; where the operation to be performed must be done according to the dictates of the judgment, as it shall deem advisable; where the difficulty, whatever there may be in the operation to be undertaken, is to be overcome by mental, and not merely manual or physical exertion; then in all such cases the difficulty of determining the question, whether or not the operator exhibited ordinary and reasonable care or skill, is much greater. To take an example of each of the different classes, as, for instance a wheelwright and a surgeon. In the case of the former, no matter what the particular piece of work, which he was called upon to perform in the course of his business, might have been, it would be difficult to conceive of one in which it would not be easy to declare whether or not he had exhibited a want of ordinary professional skill. But in the second case—that of the surgeon—there might be more difficulty than could arise in the case of the wheelwright. This example embraces in a degree the elements of both classes of professions; it requires the exercise of the judgment, and of a certain manual dexterity peculiar to itself; and questions involving the liability of surgeons for alleged professional negligence or maltreatment, may involve considerations which would ordinarily be given to each of the classes. If the point presented involved solely the question of the surgeon's manual dexterity, as exhibited in some surgical operation, the difficulty experienced would be of precisely the same nature as in the cases of the wheelwright, although, perhaps, it might be somewhat enhanced in the former case, by the fact that the operation was one involving a higher degree of dexterity. To take as an example, the case of setting a broken leg. If the point were conceded that it was necessary that the leg should be set, then it would probably be easy to decide whether or not it was done in an unskillful or negligent manner. But if the point in controversy were, not as to the manner in which the operation of setting the leg was actually performed, but as to whether or not it should have been set at all, (it might be claimed that it should have been cut off, for instance,) then there would be

more difficulty, for in that case the exercise of the surgeon's judgment would have been called into requisition, and it might be difficult to say that he acted in so negligent or unskillful a manner as to render himself liable, particularly where there may have been some doubt as to which of the two courses it would have been proper to have adopted. So in conducting a cause, where the attorney's judgment is called into action from the beginning to the end—the *bona fides* of his conduct not being questioned—it will almost always be difficult to determine whether or not he has done any act, or has pursued a course, which is so far from what a man in the exercise of ordinary skill and care, would have done or pursued, that he will be liable to his client by reason of his conduct.

It is true that there may be cases in which the error is so palpable, the negligence so manifest, that a court or jury would be authorized at once to declare that the case displays a want of reasonable diligence and skill. There are in this case various errors charged upon defendants, all of which, it is claimed, show that the defense of the action was not conducted with reasonable skill and care. One of these to which your attention and that of the court has been directed, is the action of *Mr. Peachy* with regard to the stipulation entered into between *Mr. Hackett* and himself relative to the publication of summons against *Dr. Hastings*. It appears that an understanding was had between the counsel, by which defendant's attorneys agreed to waive the actual publication of summons, and that they would, within the one hundred and thirty days, allowed by law, to an absent defendant, to come in and defend, file an answer on behalf of *Dr. Hastings*. *Mr. Hackett* drew up a stipulation which he subsequently presented to *Mr. Peachy*, representing to him that it contained the conditions of the understanding to which they had previously arrived, and requested him to sign it, which *Mr. Peachy* did. It appears, however, that this stipulation, probably from some error of *Mr. Hackett* in his computation of the time, was not worded in accordance with the understanding as it was actually had between the parties, or at least as *Mr. Peachy* understood it, the time for answering having been made shorter than that allowed by law, (and which, according to *Mr. Peachy's* understanding of the agreement, he was to receive,) by thirty days.

The consequence was that a default was entered against *Dr. Hastings*, which however, was subsequently opened, although at an expense of about seventy dollars. Now the action of *Mr. Peachy*, in signing this stipulation, was almost a purely mechanical one ; he had previously resolved upon the propriety and expediency of the step, and this was merely carrying into execution, a previously conceived intention; he probably relied upon *Mr. Hackett's* accuracy to make the proper calculation, and took it for granted that he had done so; but ordinary care would require him to have examined the stipulation before signing, and he would be liable to his client for any damages that resulted from it, but in this case no damage resulted, and it is only alluded to as an illustration.

In the conduct of an action, ordinary skill and care is required in the preparation of the case for trial, that is, in procuring the attendance of witnesses, in ascertaining from them the facts which they can establish by their testimony, and in taking such other steps as may be needful or requisite to a proper trial of the case. After this, there must be ordinary professional care and skill employed in and during the progress of the trial. And very often in regard to this point, there may be difficulty in arriving at a determination, although in this as in all other instances, the negligence may be so extreme as to be easily declared. As for instance, if an attorney, after procuring his witnesses, should omit to examine them, or, although he may have placed them upon the stand, should have failed to elicit from them their knowledge of facts which may have been important, if not absolutely essential, to his client's case, and with regard to which he knew they would have given testimony if interrogated.

These are facts which might sometimes be shown in an action like that now before you. But in this case, I believe it is not contended that any negligence of this character on the trial was exhibited by defendants. The main charge against them is, that they did not make sufficient preparation for the trial ; that is, that they did not, by proper inquiry and investigation, ascertain the existence of the facts which have been proven here with regard to the great question involved in that case,

namely, whether or not *Haven & Briceland* had authority to borrow money for *Dr. Hastings*. Now it was undoubtedly their duty to have made diligent inquiry and search as to all the matters affecting that question, and if they did make such investigation to the best of their ability — if they did with due diligence make all inquiry which lay in their power — if they did examine into the existence of all the facts which *Dr. Hastings* may have communicated to them, which may have gone, or tended, to make out a defence to the action, and did ascertain, so far as they were able, the means of substantiating those facts — then, in that particular, namely, the preparation of the case for trial, they fully discharged their duty towards *Dr. Hastings* as his attorneys.

I stated that although defendants may have been guilty of negligence in conducting the defence of *Adams* v. *Hastings*, yet *Dr. Hastings* may nevertheless not be entitled to recover anything against them — that is, he may not have sustained damage. He can recover any damage clearly attributable to their negligence, but he must establish affirmatively not only the fact of negligence, but also the fact of damage. It might be that the loss of that suit could be shown to have been directly caused by carelessness on the part of defendants, but even then *Hastings* is none the worse by such loss, unless there was a valid defence to the action. It is incumbent upon him to show this fact affirmatively, and unless he has now established the fact that he had a good defence to that action — unless he has here proven facts which, had they been established in the prior suit, would have changed its result, then he can recover nothing. I shall give you therefore the charge requested — that if there was no substantial defence to the action of *Adams* v. *Hastings* — if no just and proper defence could have been set up in said action, then defendants are not liable to plaintiff in this action.

And this brings me to the last charge requested, that if the jury believe that any important matter was omitted in the defence of the action in consequence of the absence of *Dr. Hastings*, which might have been done had he been present aiding and assisting, and that absence was not caused by the advice of the defendants, then they

are not liable in this action. I shall give this instruction, but must modify it. I have stated that it was the duty of defendants to have made all reasonable inquiry and investigation into the facts bearing upon the issue, and the defence set up. This being so, I shall charge as requested, that defendants are not liable for the non-production of facts, occasioned by the absence of *Dr. Hastings*, provided, however, they could not by such diligent inquiry and search, have discovered those facts. Having undertaken the defense with a knowledge that *Dr. Hastings* would be absent, it was a part of their duty to look up such facts as they could, and then, if there were any facts remaining behind which they could not by reasonable diligence have ascertained, but which, had *Dr. Hastings* been present, could have been established, then he, and not the defendants, must bear the responsibility of the non-production of those facts.

The action of *Adams* v. *Hastings* was, as has been proven, instituted to recover the amount of certain advances made by the former on behalf of the latter, to defray his share of the expenditures made on the common property. The money was advanced at the instance of *Hastings'* agents, who were acting under a power of attorney. The great question there raised was that this power did not confer the authority to borrow money. The fact that the alterations had been made in the original plan — that *Hastings*, prior to his departure, made a proposition to the then plaintiffs to advance money at a certain rate of interest, which proposition they declined to accept — that the advances had been actually expended on the improvements, were all established on the former trial, and in view of these facts judge *Shattuck* decided that under the power of attorney the agents had the authority to borrow money. If, on this trial there have been presented facts which were not proven, owing to a want of proper care, before judge *Shattuck*, which facts have so important a bearing upon the issue then joined that had they been proven, they would have changed the result of that action, then defendants are now liable for not having proved them; but if these new facts would not have affected that result, then they are not. I shall charge distinctly, in order that *Dr. Hastings* may have the full benefit of the charge, should

it be erroneous, and may have the ruling of the supreme court upon the construction of the power of attorney, (what he ought to have had before,) that the new facts which have been now proven, are not sufficient to have changed that result. These new facts are, that prior to *Dr. Hastings*' departure it was agreed among the owners that the North Point works should be completed out of the funds to be derived from the improvements themselves, and that the improvements should proceed according to his plans. These two are the only facts which have now been proven, in addition to those which were established before; and as I stated, I shall charge that these are not sufficient to have changed the decision of judge *Shattuck*. The defendants are not liable for the non-production of evidence which would have been unavailing if it had been produced. If they had put *Huerne* and *Flint* on the stand they could have proved the additional facts, but if these additional facts would not have affected the result, then the fact that they omitted to do so, cannot have prejudiced *Dr. Hastings*. Judge *Shattuck* decided that the power of attorney was broad enough to authorize them to borrow the money from *Adams & Co.*, and to execute the instrument upon which suit was afterwards brought. The judgment in that action was adverse to *Dr. Hastings*, and defendants appealed.

It is impossible not to see that this appeal must have been mainly to have the decision of the supreme court upon this great point; instead of which defendants in their transcript admitted the authority, and carried the case up on the question of interest alone. The main ground of defence was admitted adverse to defendant, and the supreme court were only asked to decide whether or not he must pay interest. The court reversed the judgment of the court below, upon this point, and awarded a new trial. Then defendants stipulated that judgment should be entered in favor of *Adams & Co.* upon deducting the interest only. In the present case this is the great question as bearing upon the responsibility of these defendants. It is a question not free from difficulty, and is one upon which it is not pleasant to be constrained to instruct you. I feel bound, however, to charge you, that after having made the proper objections, and taken the proper

exceptions on the trial, the omission to embody them in the statement so as to obtain the decision of the supreme court upon the main question, and then waiving by stipulation a new trial, on which the question might have again been raised, that defendants were guilty of negligence, or the omission to exercise ordinary care and skill, and are liable for any damages which plaintiff may have sustained by reason thereof.

I have said that there is very little in this case for the jury to pass upon, and this holds true notwithstanding the instruction that defendants have rendered themselves liable for all damage which *Hastings* has sustained. He claims that if there had been a new trial, he would have presented facts which would have altered the material merits of the case. He would have proven the same facts which he has proven on this trial, and this raises the question — has *Hastings* here shown any facts which would have altered the material merits — has he shown any facts which, if they had been proven before, would have changed the result of the action. I have charged that he has not. The new facts which have been proven leave the liability of *Hastings* to *Adams Co.* the same that it was before. The merits of the case have not been changed, and therefore *Hastings* sustained no damage by defendants' stipulation to waive a new trial.

This proceeds upon the assumption that judge *Shattuck* was right in his construction of the power of attorney. The decision of judge *Shattuck* is not binding upon this court, but I should be reluctant to give a decision which would in effect, overrule the decision of a court of concurrent jurisdiction. That is properly the business of the supreme court. For the purposes of this trial, I shall therefore charge you that the power of attorney, under the circumstances, was sufficient to authorise the borrowing of the money, and that hence *Hastings* had no valid defense to that action, and has sustained no damage. If I am wrong in thus instructing you with regard to the question of construction, and judge *Shattuck* was also wrong, then the supreme court can reverse my judgment, in the event of an appeal being taken, and *Hastings* can then have a judgment for the damage which that decision may show that he has sustained.

The case, however, having been submitted to the jury, the court is not at liberty to take the decision of it from them entirely. I shall therefore charge, (and the jury will bear in mind what I have already said,) that if you find that defendants have not exercised reasonable diligence and skill, in their profession as attorneys, in conducting the action of *Adams* v. *Hastings*, then they are liable for all damage which plaintiff has sustained by reason of their negligence. This negligence plaintiff must have affirmatively established. It must be shown, however, that *Hastings* had a good and valid defence to that action before defendants can be charged with any liability. The jury will first consider the action of defendants in preparing the case for trial, and pending the trial itself. If defendants then omitted to do anything to the defence of the case, which if it had been done, would have been unavailing, then they are not liable for such omission. That is, in other words, they are not liable, no matter what they did, or omitted to do, unless *Hastings* had a valid defence to the action. That is the first point which he must establish. And further, if any important matter was omitted in consequence of the absence of *Dr. Hastings*, and that absence was not occasioned by the procurement or advice of the defendants, and the defendants could not by reasonably diligent inquiry have ascertained that matter, then they are not liable for not having produced it. If no negligence has been established against defendants up to and during the trial, then the jury are to consider the subsequent facts. If they believe that in stipulating that judgment should be entered in favor of *Adams & Co.*, and that the new trial awarded by the supreme court be waived, defendants were guilty of negligence, then they are liable for all damage which plaintiff may have sustained by reason of such negligence; but in determining the amount of damage, the jury will bear in mind the instructions already given. If the jury find for plaintiff, the amount of damages to which he may be entitled will be the amount which he has actually paid out by reason of the recovery of the judgment against him, and not the present value of the interest in the property, which was sold to satisfy the judgment.

The jury returned a verdict in favor of the defendants.

LOUD v. LOUD.

Fourth District Court for San Francisco Co., June T., 1858.

DIVORCE — DESERTION — PROOF OF — COMPLAINT — VERIFICATION OF — RESIDENCE.

In an action brought by a wife on the ground of wilful desertion for two years, declarations of the defendant, that he would never again live with his wife, made within that period, will be disregarded.

A divorce sought on the ground of desertion will be denied where no direct and positive proof of the fact of desertion is introduced—the allegation of the bill being sustained only by declarations of defendant, that he would never again live with plaintiff.

Semble that a complaint filed to obtain a divorce, is insufficiently verified, where the verification is not made by the plaintiff personally, but by one *A.*, who does not describe himself as attorney or agent of the plaintiff, nor in any way claim to act by her authority or request.

If a husband *deserts* his wife in another state, and she continues to reside in such state, and he comes to this state to reside, then whether his residence in this state would, after such desertion, be hers, *quaere ?*

The necessary facts are fully given in the opinion.

J. P. Treadwell, for plaintiff.

Defendant not in court.

HAGER, J.—This action is brought to obtain a divorce and division of the common property, stated to be $20,000, upon the alleged ground of willful desertion for the period of two years.

By the testimony reported, it appears that plaintiff and defendant resided and lived together as man and wife, in *San Francisco*, for some years prior to 1855, when they left, and went to the state of *New Jersey*, where plaintiff still resides, and sometime after, defendant returned to this state.

Only two witnesses have testified on the part of the plaintiff, and none have been introduced by the defendant. In support of the allegation of desertion, one of them testifies that plaintiff and defendant

arrived in *New York* in the fall of 1855, when defendant removed his wife to *New Jersey*, left her there among her friends, and then went to *Boston* and made that place his home during the greater portion of the time he remained at the east; that, soon after his arrival, defendant declared to witness that he never should live with plaintiff again.

The other witness testifies that in the summer of 1856 he saw defendant in *Boston*, when he declared that he would not live with his wife again.

This action having been instituted in Feburary, 1858, and the declarations, testified to by the last witness, having been made within the two years immediately preceding that time, they do not support the allegation of desertion for two years prior to the commencement of the action. The granting or refusing this application, then, must depend upon the sufficiency of the testimony of one witness.

By the statute of this state, supplementary to the act concerning divorces, passed April 24, 1857, it is declared that "no divorce shall be granted on the admission or statement of either party, but in all cases the court shall require proof of the facts alleged as the grounds for a divorce," etc. This statute is simply in affirmance of a well recognized principle of the common law.

Now, in this case there is no proof that defendant did desert his wife, except his own declarations, which, by the law of this state, cannot be received as sufficient evidence of that fact. It may be true that defendant declared he would never live with his wife again, and such may have been his intention, and yet, for all that, it is within the range of probability, and uncontradicted by the proofs, that he did not strictly adhere to his declared intention. Declarations are often made under temporary excitement or irritation, which are transitory, and soon pass away. If he did in fact abandon his wife, as alleged, it was susceptible of direct proof. It would be impolitic and unwise, as well as in violation of the law of the state, to grant a divorce simply on the ground that a husband declared it was his intention no longer to live with his wife, and in the absence of all proof as to the fact whether he did or did not live with her after that period.

If defendant is liable to the charge of desertion for the period men-

tioned in the statute, it seems to me it would be an easy matter for plaintiff to establish it by some sufficient positive or circumstantial testimony. She must have some friends or acquaintances who are conversant with the facts or circumstances by which the intention to desert was manifested at or subsequent to the time it occurred. Did he ever visit her after he left her in *New Jersey?* Did she ever seek or offer to rejoin him, or call upon for an explanation? Did they meet before he left this state, and what was defendant's manner on such occasion? As to these important inquiries we have no information. There is no evidence that can be received as proof, or any presumption, to sustain the allegation of desertion.

It may also be remarked that, by the same statute above referred to, it is required that in every action for a divorce, the complaint must be verified. This complaint purports to be verified by *William O. Wedgwood.* Who he is, or by what authority he acts, does not appear. He does not describe himself as the attorney or agent of the plaintiff, or in any way claim to act by her authority or request. If I thought it necessary to pass upon the sufficiency of this verification, I should be inclined, from present impressions, to hold it insufficient. It may also be doubted whether the plaintiff has resided in this state for six months immediately preceding her action. If it be true that the husband deserted her while residing in *New Jersey*, and that she still resides there, his residence here would not necessarily be her's after he had in fact abandoned and deserted her there. But the proofs in support of the allegation of desertion being insufficient, the application for a divorce, etc., must be denied.

Decree ordered accordingly.

RANDALL v. RANDALL.

Fourth District Court for San Francisco Co., April T., 1858.

DIVORCE — DESERTION — PROOF OF.

In an action by a wife for a divorce on the ground of desertion, it was proven that defendant had neglected her, that she then went to live with her mother; that defendant left this state, and since then has lived and continues to live in another state, and that prior to his departure, he declared that he would leave plaintiff and never return; it was not proven that after leaving him, plaintiff ever offered to return to him, and it appeared was not willing so to do. *Held*, that the divorce must be denied.

The necessary facts are sufficiently stated in the opinion.

John Reynolds, for plaintiff.

Defendant not in court.

HAGER, J.—This is an action to obtain a divorce on the ground of desertion.

By the proofs reported it appears that the parties were married in this city and county, and lived together about a year, when plaintiff left defendant, went to live with her mother, and continued afterwards to reside there. Defendant was the mate of a ship, and was in the habit of visiting his wife occasionally, and when he returned from a voyage, at her mother's house, and made his home there until June, 1855, when he left this state in a ship, has not been seen here since, and now resides in the state of *Maine*. The mother testifies that plaintiff married against her will, and that defendant neglected plaintiff, and for that reason she came to live with her. Before defendant left this state, he declared, as one of the witnesses testifies, he was "put out" with his wife, would leave her and never return.

The plaintiff has also given in evidence a letter from the defendant, acknowledging the receipt of a copy of the complaint in this action, in which he in effect states that if plaintiff will release all claim to his estate he will not oppose her application for a divorce.

This is substantially the proof pertinent to the issue presented, and in my opinion it is insufficient to establish the fact of willful desertion of the plaintiff, on the part of the defendant.

Taking the testimony of the mother, the fact of plaintiff leaving defendant, into consideration, it is sufficient to raise a doubt of the truth of any presumption that defendant is guilty of willful desertion.

Did plaintiff know of his departure? Did she offer to accompany him, and did he refuse to receive her? These are questions that are unanswered.

It is true that it is proven that he did leave without his wife, and and that he said he would leave her and never return; but it is not proven by facts or circumstances that he refused or would have refused to take her with him had she been willing to go. On the contrary, I must infer from the circumstances, that the mother opposed the marriage, that plaintiff left defendant and went to reside with her mother, and from the letter of defendant, that plaintiff was not willing to go with defendant.

The allegations of the complaint are not sustained, and the application for a divorce is denied. Decree accordingly.

MERRILL vs. AUBIN GAS CO. FOR CALIFORNIA.

Twelfth District Court for San Francisco Co., Jan. T., 1858.

SUMMONS—WRIT OF ATTACHMENT.

A summons is not "issued," within the meaning of the practice act, until it is taken from the clerk's office, with the intent to be served.

The practice act provides that a certified copy of the complaint shall be served with the summons, and hence the placing a summons in the hands of an officer, before a copy of the complaint is issued by the clerk, is evidence that the summons was not issued with intent to be served until a copy of the complaint should be furnished.

On motion to discharge a writ of attachment. The material facts are given in the opinion.